



Kirkpatrick & Lockhart Nicholson Graham LLP

Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222-2312
412.355.6500
Fax 412.355.6501
www.klng.com

October 27, 2006

United States Patent and Trademark Office
ATTN: Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 22313-1451

Christopher M. Verdini

412.355.6766
Fax: 412.355.6501
cverdini@klng.com

TTAB

**Re: Glenn Danzig v. Cyclopiian Music, Inc.
Cancellation No. 92045173**

Dear Sir or Madam:

Enclosed for filing in the above-referenced Cancellation action is Registrant Cyclopiian Music, Inc.'s Response in Opposition to Petitioner's Motion for Summary Judgment (the "Response") which consists of the Response, the redacted version of the Declaration of Curtis B. Krasik in support of the Response, the Declaration of Gerald Caiafa in support of the Response and Registrant Cyclopiian Music, Inc.'s Rule 56(f) Motion in support of the Response. Also enclosed for filing under seal pursuant to the stipulated protective order entered in this action is the unredacted version of the Declaration of Curtis B. Krasik in support of the Response.

Sincerely,



Christopher M. Verdini

Enclosures

10-27-2006

U.S. Patent & TMOc/TM Mail Rcpt Dt. #22

1451, Alexandria, VA 22313-1451
Karen Lyree

Trademark Registrations that are at issue in this action: (1) U.S. Trademark registration No. 2,793,533 for the mark MISFITS for various types of jewelry in International Class 14; (2) U.S. Trademark Registration 2,634,215 for the mark MISFITS for (i) musical sound recordings and prerecorded audio tapes and videotapes featuring recorded musical performances and music videos in International Class 9; (ii) various paper goods and printed matter in International Class 16; and (iii) musical entertainment services in International Class 41; and (3) U.S. Trademark Registration No. 2,735,848 for the mark MISFITS (Stylized) for (i) musical sound recordings and prerecorded audio tapes and videotapes featuring recorded musical performances and music videos in International Class 9; and (ii) various paper goods and printed matter in International Class 16 (collectively, the "MISFITS Marks"). Petitioner did not oppose any of Cyclopien's applications for these registrations

However, over three years after the registrations first were granted by the PTO, Petitioner out-of-the-blue filed this action seeking their cancellation. Petitioner now moves for partial summary judgment on his claims with respect to: (i) Cyclopien's Registration No. 2,793,533 in International Class 14; (ii) Registration No. 2,634,215 in Class 9 only; and (iii) Registration No. 2,735,848 in Class 9 only. Petitioner filed the Motion prior to the close of discovery. In fact, in a transparent display of tactical gamesmanship, Petitioner filed the Motion just days before Petitioner's deposition was scheduled to occur, which had been noticed for over a month. As a result, Cyclopien was thwarted from having the opportunity to cross-examine Petitioner on the merits of his claims.

In particular, Cyclopien could not confront Petitioner regarding his unsubstantiated claim that he "has been using the MISFITS Marks on t-shirts, apparel and other merchandise, which are included in the goods and services recited in the subject registrations"—a claim that

Cycloplan fundamentally disputes. To the contrary, the record demonstrates that Petitioner did not use the MISFITS Marks from execution of the settlement agreement among the parties in December 1994 until at least the fourth quarter of 1999 (on apparel, which is not even at issue in this proceeding), and thus abandoned any rights he may have claimed in the MISFITS Marks. Even assuming *arguendo* that the Board would credit Petitioner's conclusory allegation of use unsupported by any actual evidence, at a minimum, a disputed issue of material fact would exist as to the fact and scope of Petitioner's purported use that precludes the entry of summary judgment. For these reasons and the reasons set forth herein, Petitioner's Motion should be denied.

II. FACTUAL BACKGROUND¹

A. History Of The MISFITS

The MISFITS is a punk rock music group initially formed in the late 1970's. *See* Declaration of Gerald Caiafa ("Caiafa Dec."), ¶ 3. Two of the original members of the MISFITS were Petitioner and Gerald Caiafa p/k/a Jerry Only, principal of Cycloplan, who is the only person to be a member of the group throughout its existence to the present. *Id.*, ¶¶ 2 & 3. This initial incarnation of the MISFITS recorded and performed from approximately 1977 through 1983, at which time the group disbanded. *Id.*, ¶ 4. Over the next decade, Petitioner unilaterally

¹ Petitioner's Memorandum of Points and Authorities in support of the Motion contains numerous factual assertions that are unsupported by any admissible evidence. *See Abbott Laboratories v. Tac Indust., Inc.*, 217 U.S.P.Q. 819, 822-23 (T.T.A.B. 1981) ("[S]tatements of counsel in a brief . . . must be supported by evidence."). Such unsupported factual assertions cannot be considered by the Board on a motion for summary judgment. *See B.L. Cars Limited v. Puma Industria de Veiculos S/A*, 221 U.S.P.Q. 1018, 1019 (T.T.A.B. 1983) ("[A]pplicant's brief contains a number of factual statements which cannot be considered in the absence of properly submitted evidence to support them."); *see also Kellogg Co. v. Pack-Em Enterprises, Inc.*, 14 U.S.P.Q. 1545, n.6 (T.T.A.B. 1990) ("[S]tatements made in pleadings cannot be considered evidence [on] behalf of the party making them, even upon summary judgment, but rather must be proved in the normal manner.").

entered into a series of deals to release recordings of the MISFITS without the knowledge or consent of, and compensation to, the other contributing members of the group. *Id.*, ¶ 5. Upon becoming aware of Petitioner's unlawful conduct, the other members of the MISFITS during the 1977-1983 period, including Gerald Caiafa, filed suit against Petitioner in the United States District Court for the Southern District of New York in or around 1992 (the "1992 Action"). *Id.*

B. The Settlement Agreement

The 1992 Action ultimately was resolved by a settlement agreement dated December 31, 1994 (the "Settlement Agreement"). *Id.*; *see also* Declaration of Brian W. Kasell ("Kasell Dec."), Exhibit 1. The Settlement Agreement provided that all of the MISFITS' musical recordings from 1977-1983 and the copyrights associated therewith would be sold to Caroline Records, Inc. ("Caroline Records"), with the proceeds divided among the parties. Kasell Dec., Ex. 1, ¶¶ 1 & 2. The Settlement Agreement also provided that "the parties shall be co-owners of the name and trademarks of the Misfits and all logos and artwork . . . previously associated therewith." *Id.*, Ex. 1, ¶ 5. With regard to such historical references, neither side had any obligation to account to the other for revenues derived from any merchandising activities. *Id.*, Ex. 1, ¶ 5.

Going forward, however, the Settlement Agreement provided that the plaintiffs, Gerald Caiafa, Paul Caiafa, Frank Licata and Julio Valverde, would have "the exclusive right to publicly perform and record as 'The Misfits.'"² *Id.*, Ex. 1, ¶ 7. In that regard, the parties agreed to issue a press release that was attached as an exhibit to the Settlement Agreement, which provided in pertinent part: "The Misfits are also pleased to announce that a new group which will perform

² Following the execution of the Settlement Agreement, plaintiffs Frank Licata, Julio Valverde, Gerald Caiafa and Paul Caiafa entered into a separate agreement pursuant to which all rights to the MISFITS were granted to Gerald and Paul Caiafa. Messrs. Caiafa subsequently assigned all of their rights in the MISFITS to Cycloplan. *See* Caiafa Dec., ¶ 6.

and record as the Misfits has been formed. This group will consist of Jerry Caiafa and his brother Paul Caiafa who were former members of the Misfits as well as new members . . . **Glenn Danzig will not be a member of this new/old group.**” *Id.*, Ex.1, Exhibit C (emphasis added). The Settlement Agreement provided that Petitioner would not receive any payments from such future performances and recordings, nor would he receive any benefits from future activities of the group. *Id.*, Ex. 1, ¶ 7.

Under the Settlement Agreement and otherwise, Petitioner made clear his intention not to be associated or identified with the MISFITS going forward. In addition to the disclaimer in the press release announcing the formation of the new MISFITS group, the Settlement Agreement itself expressly required that “for a period of two years, [Cycloplan] shall advise all promoters of [any] live concerts and include in all contracts relating thereto provisions indicating that any promotional material generated in connection with performance by the Misfits identifies the current members of the band or **specifies that Danzig is not a member of the band.**” *Id.*, Ex. 1, ¶ 7 (emphasis added). As a practical matter, Petitioner expected, and indeed desired, that the MISFITS would fail as a musical group without his involvement and thus wanted nothing to do with the new MISFITS project. *See* Caiafa Dec., ¶ 6.

Concurrent with the execution of the Settlement Agreement, in September 1994, Petitioner further confirmed his intention not to be identified with the MISFITS going forward by abandoning his pending trademark application (App. No. 74/300,499) for MISFITS in Class 16. *See* Declaration of Curtis B. Krasik (“Krasik Dec.”), Exhibit 1.

C. The MISFITS After The Settlement Agreement

Since 1994, Cycloplan and its principal, Gerald Caiafa p/k/a Jerry Only, have exclusively controlled the MISFITS as an active musical group. *See* Caiafa Dec., ¶ 7. Over that time, the

MISFITS have released four full length music albums of new MISFITS recordings in addition to various other singles. *Id.* The MISFITS also have promoted live concert tours throughout the United States and overseas, including Europe, South America, Asia, and Australia. *Id.*

At the same time, Cycloplan has developed an extensive MISFITS merchandise licensing program ancillary to the MISFITS' popularity and success as an active musical group. *Id.*, ¶ 8. Such licensing activities have included, but are not limited to, myriad types of MISFITS-branded clothing, footwear, posters, stickers, buttons, pins, trading cards, action figures and skateboards and related accessories. *Id.* MISFITS-branded merchandise is sold through prominent retail outlets, including Hot Topic and Virgin Megastores, as well as through Cycloplan's website at www.misfits.com. *Id.* The popularity and success of sales of MISFITS merchandise is derivative of the consumer recognition and goodwill Cycloplan has developed in the MISFITS as a musical group since 1995, with which Petitioner has had no involvement and in fact is contractually prohibited from being associated. *Id.*, ¶ 9.

In short, Cycloplan has developed the MISFITS into a musical and cultural phenomenon and, in the process, considerably expanded the audience and fan base for MISFITS goods and services into markets previously untapped by the 1977-1983 incarnation of the MISFITS. *Id.*, ¶ 10. All of this newly-developed artistic and commercial success and goodwill has resulted exclusively from Cycloplan's efforts; Petitioner has made no contribution whatsoever. *Id.* In recognition of its exclusive use and exploitation of the MISFITS subsequent to the execution of the Settlement Agreement and in connection with the foregoing activities, Cycloplan applied for and was granted the registrations for the MISFITS Marks at issue in this action. *Id.*

D. Petitioner After The Settlement Agreement

In stark contrast, after entering into the Settlement Agreement, Petitioner continued to demonstrate his complete disassociation with the MISFITS. As required by the Settlement Agreement, Petitioner has not publicly performed or recorded as the MISFITS. *Id.*, ¶ 11. As such, Petitioner has not been part of the MISFITS since the 1977-1983 incarnation of the MISFITS disbanded approximately twenty-five years ago. *Id.* During the intervening quarter of a century, Petitioner has formed and performed with two wholly unrelated musical groups—Samhain and Danzig—and he continues to promote and perform with the group Danzig to this day. *Id.*

Although Petitioner baldly claims in the Motion that since execution of the Settlement Agreement in December 1994 he “has been using the MISFITS Marks on t-shirts, apparel and other merchandise, which are included in the goods and services recited in the subject registrations,” he has failed to submit evidence of such alleged use. Motion at 7. Indeed, the record demonstrates that Petitioner did not use the MISFITS name in connection with any goods or services whatsoever until at the earliest the fourth quarter of 1999—five years after execution of the Settlement Agreement. *See* Kasell Dec., Ex. 3. In October 1999, Petitioner entered into a license agreement with Blue Grape Merchandising (“Blue Grape”) pursuant to which he purported to license certain rights to the MISFITS name. *Id.* According to the Blue Grape senior executive who negotiated the deal, however, Blue Grape approached Petitioner because it desired to license Petitioner’s rights to his band Danzig. *See* Krasik Dec., Ex. 2, pp. 20:10-21:21. As an afterthought, Petitioner proposed including his alleged MISFITS rights as part of the deal because he claimed “**he had rights that were not being utilized** and . . . there was profit to be made from it.” *Id.*, Ex. 2, pp. 28:7-25 (emphasis added). Indeed, Blue Grape’s sales

records, produced by Bravado International Group, Inc.³ in response to Cycloplan's subpoena in this proceeding, establish that MISFITS-related merchandise pursuant to the Blue Grape license was first sold in the fourth quarter of 1999. *See* Krasik Dec., Ex. 3 & 4.

By this time, Cycloplan had long been publicly performing and recording as the MISFITS and had established a unique identity and new fan base. It was only after—and we submit because—Cycloplan had developed such new goodwill and consumer recognition that Petitioner out-of-the-blue sought to exploit and profit from the MISFITS Marks.

III. ARGUMENT

A. Summary Judgment Standard

Summary judgment may only be granted if the moving party demonstrates "that there are no genuine issues as to any material fact, and that it is entitled to judgment as a matter of law." *See, e.g., Medinol Ltd. v. Neuro Vasx, Inc.*, 67 U.S.P.Q.2d 1205 (T.T.A.B. 2003). The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist and the evidence and all inferences to be drawn from the undisputed facts must be viewed in the light most favorable to the nonmoving party. *See Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 849-50 (Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy's Inc.*, 961 F.2d 200, 202 (Fed. Cir. 1992). If the moving party does not prove that there are no genuine issues of material fact or does not prove that it is entitled to judgment as a matter of law, summary judgment should be denied. *See Olde Tyme Foods, Inc.*, 961 F.2d at 205 (reversing T.T.A.B.'s grant of summary judgment because moving party did not show both that there was a lack of a genuine issue of material fact and that it was entitled to judgment as a

³ Bravado International Group, Inc. is the successor-in-interest to Blue Grape.

matter of law); *Medinol Ltd.*, 67 U.S.P.Q.2d 1205 (denying summary judgment because moving party did not demonstrate that it was entitled to judgment as a matter of law).

B. Trademark Rights Must Be Perfected Through Continued Use

Petitioner seeks cancellation of Cycloplan's registrations based on alleged co-ownership rights in the MISFITS Marks arising out of the 1994 Settlement Agreement without regard to the parties' actual commercial activities over the last twelve years. Motion at 4 ("Petitioner's . . . rights in the MISFITS Marks can be ascertained solely by reference to the 1994 Settlement Agreement The Settlement Agreement provides for Petitioner's co-ownership and use of the MISFITS Marks with Messrs. Gerald Caiafa and Paul Caiafa. Such co-ownership, in and of itself, bars Registrant from claiming exclusive rights to use the MISFITS Marks."). Petitioner's claim is fundamentally defective as a matter of law.

It is well-settled that "[t]rademark ownership inures to the legal entity **who is in fact using the mark** as a symbol of origin" for the identified goods and services. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 16:35 (4th ed. 2005) (emphasis added). To that end, the Lanham Act defines a trademark as "any word, name, symbol or device, or any combination thereof – (1) **used** by a person" 15 U.S.C. § 1127 (emphasis added). In other words, to own rights in a mark for specified goods and services, one must use the mark on or in connection with those goods and services in U.S. commerce. *McCarthy* § 17:9 ("It is actual usage of a symbol as a 'trademark' in the sale of goods which creates and builds up rights in a mark.>").

Even if one ostensibly has a right to use a mark, that right and in turn trademark ownership can "**only be perfected by use.**" *Oklahoma Beverage Co. v. Dr. Pepper Love Bottling Co.*, 565 F.2d 629, 631 (10th Cir. 1977) (emphasis added); *see also Smith v. Coahoma*

Chemical Co., 264 F.2d 916, 919 (C.C.P.A. 1959) (holding that even if appellant acquired the subject mark as a result of an assignment, appellant's failure to use the mark was fatal to the validity of its registrations for the mark); *McCarthy* § 17:9 (“[L]ack of actual usage of a symbol as a ‘trademark’ can result in a loss of legal rights.”). This basic tenet of trademark law was analyzed and affirmed by the Tenth Circuit in *Oklahoma Beverage Co.*, the holding of which is on all fours with the dispositive issue in this case.

In *Oklahoma Beverage Co.*, two brothers, J.H. and K.C. Love, formed a partnership in 1919 using the trademark “Love” in connection with the sale of soft drinks. *Oklahoma Beverage Co.*, 565 F.2d at 630. The partnership dissolved in 1928 but J.H. continued to use the LOVE mark from 1928-1964, obtaining a trademark registration for the mark in 1928.⁴ *Id.* In 1964, J.H. sold his business and its goodwill to Oklahoma Beverage Co., which continued to use the LOVE mark after the sale. *Id.* Conversely, K.C. stopped using the LOVE mark following the dissolution of the partnership in 1928 and did not resume using it until 1972. *Id.* In 1974 after learning that Oklahoma Beverage Co.’s was using the LOVE mark, K.C. threatened to bring a trademark infringement lawsuit against Oklahoma Beverage Co. *Id.* In response to K.C.’s threat, Oklahoma Beverage Co. filed a declaratory judgment action to determine the ownership of the LOVE mark. *Id.*

K.C. claimed ownership (more precisely, co-ownership with J.H.) of the LOVE mark based on the dissolution of the brothers’ partnership in 1928. *Id.* The court agreed that at the time of dissolution both J.H. and K.C. had the equal right to use the LOVE mark. *Id.* at 631. The court aptly recognized, however, that **“K.C. Love may have then [in 1928] had the right**

⁴ That registration lapsed in 1949 but J.C. filed for a new registration for the mark in 1955. This new registration was issued solely in the name of J.H. because only he was using the mark. *Id.* at 630-31.

to use the “Love” trademark, but the right could only be perfected by use. . . . [T]he right in the trademark comes from the continued use.” *Id.* (emphasis added). Because K.C. did not use the LOVE mark from 1946-1972, the court ruled that K.C. had abandoned any rights he may have once had in the LOVE mark. *Id.* at 631-32.

The analysis and holding of *Oklahoma Beverage Co.* squarely applies here. Petitioner claims that he “has a contractual right to co-ownership of the MISFITS Marks, separate and apart from [any] rights arising from use of the marks.” Motion at 6 (emphasis added). This alleged contractual entitlement to trademark co-ownership irrespective of use is the precise argument that was considered and decisively rejected by the Tenth Circuit in *Oklahoma Beverage Co.* Simply put, trademark ownership rights cannot accrue absent use of the mark. As a matter of law, therefore, Petitioner cannot rely on the Settlement Agreement alone to support his claim of trademark ownership rights in the MISFITS Marks.

C. Petitioner Abandoned Any Rights He May Have Had In The MISFITS Marks

1. Legal Standard For Abandonment

15 U.S.C. § 1127 provides:

A mark shall be deemed to be “abandoned” . . . (1) [w]hen its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment.

“Introduction of evidence of nonuse of the mark for [three] consecutive years constitutes a prima facie claim of abandonment and shifts the burden to the party contesting abandonment to show either: (1) evidence to disprove the underlying fact triggering the presumption of [three] years nonuse or (2) evidence of an intent to resume use to disprove the presumed fact of no intent to resume use.” *Nabisco, Inc. v. Wm. Wrigley Jr. Co.*, 40 U.S.P.Q.2d 1251, 1255-56 (T.T.A.B. 1995).

Once a prima facie case is shown, the party claiming abandonment no longer has the burden to prove an intent not to resume use under 15 U.S.C. § 1127. *See, e.g., Rivard v. Linville*, 133 F.3d 1446, 1449 (Fed. Cir. 1998). To the contrary, the party contesting abandonment “must put forth evidence with respect to either specific activities engaged in during the period of nonuse or special circumstances which excuse nonuse.” *Nabisco, Inc.*, 40 U.S.P.Q.2d at 1257. Significantly, abandonment of a “mark cannot be reversed by subsequent re-adoption of a mark.” *Parfums Nautee Ltd. v. Am. Int’l Indus.*, 22 U.S.P.Q.2d 1306, 1310 (T.T.A.B. 1992). Thus, any efforts to use the mark after abandonment “of whatever nature and quality, represent a new and separate use, and cannot serve to cure the prior abandonment.” *Id.*

The T.T.A.B. and federal courts have routinely found abandonment, even on summary judgment, where the record establishes that one party did not use and did not have an intent to use a mark for the statutory period. *See, e.g., Rivard*, 133 F.3d at 1448-50 (affirming summary judgment canceling a mark where the evidence showed nonuse and there was no genuine issue of fact regarding excusable nonuse); *Nabisco, Inc.*, 40 U.S.P.Q.2d at 1257-58 (granting summary judgment in favor of petitioner because petitioner proved prima facie abandonment and respondent failed to raise a genuine issue of material fact as to its intent to resume use of the mark); *Parfums Nautee Ltd.*, 22 U.S.P.Q.2d at 1310 (granting summary judgment in favor of petitioner where the evidence showed no use for three years and no intent to resume use during that time).

2. Petitioner Did Not Use The MISFITS Marks From At Least 1994-1999

As described above, Petitioner has not presented, because he cannot present, any evidence of his use of the MISFITS Marks from the execution of the Settlement Agreement in December 1994 through the fourth quarter of 1999—a period of approximately five years. By

Petitioner's own admission, his earliest use of the MISFITS Marks in connection with any goods was pursuant to a license agreement with Blue Grape entered into in October 1999. *See* Kasell Dec., Ex. 3. Indeed, Blue Grape's sales records establish that MISFITS-related merchandise pursuant to the Blue Grape license was first sold in the fourth quarter of 1999. *See* Krasik Dec., Ex. 3 & 4. Such merchandise, however, was limited to certain apparel in Class 25, which are not at issue in this proceeding. *Id.*

With specific regard to the classes of goods for which Petitioner seeks summary judgment, Petitioner's earliest use of the MISFITS Marks in Class 14 was in the fourth quarter of 2001 (in connection with key chains, which are not even covered by Cyclopien's Class 14 registration). *Id.* This seven year period of nonuse in Class 14 after the execution of the Settlement Agreement indisputably gives rise to prima facie evidence of abandonment under 15 U.S.C. § 1127. Petitioner's Motion wholly fails to present any evidence to discharge his burden of proof to negate the prima facie abandonment of his rights in Class 14.

As regards Class 9, Petitioner has not used, and indeed is contractually prohibited from using, the MISFITS Marks in Class 9 subsequent to the execution of the Settlement Agreement. *See* Kasell Dec., Ex. 1, ¶ 7. It is undisputed that the Settlement Agreement granted Cyclopien the exclusive rights to publicly perform **and record as the MISFITS**. *Id.*, Ex. 1 ¶ 7; Motion at 2. Absent the rights to perform and/or record as the MISFITS, as a practical matter, Petitioner could not use the MISFITS Marks in connection with the goods identified in the Class 9 registrations (i.e., musical sound recordings; and, prerecorded audio tapes and videotapes featuring recorded musical performances and music videos) without breaching the Settlement Agreement.

“[A]greements to cease use of a mark or to not use a mark in a certain format are routinely upheld and enforced.” *Vaughn Russell Candy Co. v. Cookies In Bloom, Inc.*, 47 U.S.P.Q.2d 1635, 1638 n.6 (T.T.A.B. 1998); *see also McCarthy* § 18:82.⁵ In *Vaughn Russell*, the applicant for the mark COOKIES IN BLOOM “INCREDIBLE EDIBLE COOKIE ARRANGEMENTS” had entered into a settlement agreement with the opposer whereby the applicant agreed to cease any use of the mark “INCREDIBLE EDIBLE COOKIE ARRANGEMENTS.” *See id.* at 1636-37. The Board granted summary judgment for the opposer and refused registration of the mark because trademark law requires use of the mark in commerce and the settlement agreement precluded any use of the mark by the applicant. *See id.* at 1367-38. Equally, here, Petitioner cannot have ownership rights in the MISFITS Marks in Class 9 because he has not used, and is contractually prohibited from using, the marks in connection with such goods under the Settlement Agreement.

Although Petitioner concedes Cyclopien’s exclusive rights to publicly perform and record as the MISFITS post-Settlement Agreement,⁶ he attempts to circumvent this absolute restriction on his right to use the MISFITS Marks by claiming that he “retained the right to manufacture and sell . . . previously recorded music and performances.” Motion at 2. In connection with that claim, the Declaration of Petitioner’s litigation counsel submits photocopies of two compact discs containing musical recordings from the band’s 1977-1983 period that supposedly constitute

⁵ When an agreement between parties restricts or prohibits the use of a mark that is subject to a cancellation or opposition proceeding, the Board must consider the agreement. *See M-5 Steel Mfg., Inc. v. O’Hagin’s Inc.*, 61 U.S.P.Q.2d 1086 (T.T.A.B. 2001).

⁶ Petitioner also makes the absurd claim that “this exclusive right is separate from, and has no bearing on, the issue of whether or not Registrant is the exclusive owner of the MISFITS marks.” Motion at 6 n.1. It is axiomatic that if Cyclopien has the exclusive rights to perform and record as the MISFITS, it is the only entity that can use the mark in commerce so as to accrue trademark rights under the Lanham Act.

“sample MISFITS merchandise produced and sold on behalf of Petitioner.” *See* Kasell Dec., Ex.

4. Petitioner’s claim is entirely unfounded and indeed highly disingenuous.⁷

Concurrent with the execution of the Settlement Agreement, Petitioner and the plaintiffs to the 1992 Action entered into a catalog purchase agreement (the “Catalog Purchase Agreement”) with Caroline Records pursuant to which all “right, title and interest in and to all of the master recordings . . . embodying the performances of the recording group publicly known as The Misfits which were recorded prior to the date hereof” were sold, assigned and transferred to Caroline Records. *See* Caiafa Dec., Ex. 1, ¶ 1.⁸ It was expressly understood that “all master recordings embodying performances of Artist [defined as Danzig and the plaintiffs to the 1992 Action] as members of the Misfits which are owned or controlled by Seller [defined as Danzig and the plaintiffs to the 1992 Action] . . . are being transferred to Buyer [Caroline Records] hereunder.” *Id.*, Ex. 1, ¶ 1. The rights sold to Caroline Records included “all copyrights therein and thereto in the Masters” as well as “all future earnings which shall be due or payable with regard to the exploitation and sale of the Assets [defined as the master recordings and all copyrights thereto] or which pertain to the Assets.” *Id.*, Ex. 1, ¶ 1. Petitioner and the plaintiffs to the 1992 Action further represented and warranted that “after the date hereof, Seller or their

⁷ In addition, Petitioner’s counsel—in distinction to Petitioner—is not competent to make such a factual assertion in the first instance because he lacks personal knowledge. *See Person’s Co., Ltd. v. Christman*, 9 U.S.P.Q.2d 1477 (T.T.A.B. 2003) (refusing to consider factual statements of attorney affidavit not made of the affiant’s personal knowledge); *see also Carnrite v. Granada Hosp. Group, Inc.*, 175 F.R.D. 439, 449 (W.D.N.Y. 1997) (“An attorney affidavit not based on personal knowledge is an impermissible substitute for the personal knowledge of the party.”). The Board, therefore, should not consider counsel’s factual assertion of the MISFITS merchandise supposedly sold on Petitioner’s behalf. Indeed, this is yet another instance of tactical gamesmanship to attempt to avoid subjecting Petitioner to cross-examination on his claims.

⁸ The Catalog Purchase Agreement excluded from the sale to Caroline Records certain limited master recordings owned by third parties, which thus are irrelevant to this proceeding. *See* Caiafa Dec., Ex. 1, ¶ 1.

assigns or licensees shall not exploit, market or sell the Assets, or any part thereof.” *Id.*, Ex. 1, ¶

2. Accordingly, upon execution of the Catalog Purchase Agreement with Caroline Records, neither Petitioner—nor Cycloplan for that matter—possessed any rights to MISFITS musical recordings existing as of that date.

The compact disc depicted at Bates No. DANZ 0208 (known as “Static Age”) was released by Caroline Records in 1997 featuring MISFITS recordings from the 1977-1983 period. *See* Caiafa Dec., ¶ 13. Caroline Records owned all rights to these recordings, including the copyrights, pursuant to the Catalog Purchase Agreement. *Id.* Thus, Caroline Records certainly did not produce or sell “Static Age” on behalf of Petitioner but rather in exploitation of its own ownership rights to the MISFITS recordings it acquired under the Catalog Purchase Agreement.⁹

Furthermore, Petitioner’s newly-minted claim that “Static Age” supposedly was “MISFITS merchandise produced and sold on behalf of Petitioner” is materially inconsistent with his prior interrogatory responses in this action. In response to Cycloplan’s Interrogatory No. 4 that asked Petitioner to “[i]dentify each and every product you have sold or offered for sale using the MISFITS Mark since December 31, 1994,” Petitioner responded that he sold “at least the following items under the MISFITS mark since December 31, 1994: t-shirts, sweatshirts, and stickers . . . [and] products bearing the MISFITS marks were sold through licensed merchandising companies, who handled the production and sale of these items.” *See* Krasik

⁹ Strictly speaking, Caroline Records’ use of the name the Misfits on the cover of “Static Age” was not used as a trademark but rather was used to describe the contents of its product, namely the MISFITS musical recordings. Indeed, there is no evidence that Caroline Records was granted a license to use the MISFITS mark pursuant to the Catalog Purchase Agreement or otherwise. As a result, Caroline Records did not use a TM symbol in relation to the Misfits name anywhere on the cover art and nor did it use the MISFITS’ trademarked stylized “horror font” that is the subject of Trademark Registration No. 2,735,848. In addition, “Static Age” was released by Caroline Records in the same year that Cycloplan released “American Psycho” (which used the MISFITS’ trademarked stylized “horror font”) pursuant to its exclusive rights under the Settlement Agreement. *See* Caiafa Dec., ¶13 & Ex. 2.

Dec., Ex. 5. This response plainly does not identify the “Static Age” album, nor can “licensed merchandising companies” plausibly be interpreted to refer to Caroline Records—both of which Petitioner certainly would have known by name at the time he responded to Cycloplan’s interrogatories. It is fundamentally inconsistent and disingenuous for Petitioner now to attempt to rely on such previously undisclosed purported evidence in moving for summary judgment.

The compact disc depicted at Bates No. DANZ 0212 (known as “Collection I”) is completely irrelevant to the issues in this proceeding. *See* Caiafa Dec., ¶ 14. “Collection I” was released in 1986,¹⁰ nearly a decade before execution of the Settlement Agreement. *Id.* Under any circumstances, therefore, it cannot constitute trademark use by Petitioner in Class 9 from December 1994 to the present. *See Empresa Cubana Del Tabaco v. Culbro Corp.*, 213 F. Supp. 2d 247, 258 n. 11, 269-71 (S.D.N.Y. 2002) (finding abandonment where defendant made no new sales under the mark for a period of five years even though during that five year period products displaying the mark stayed on store shelves). Moreover, any ownership rights Petitioner may have claimed in connection with “Collection I” were sold to Caroline Records in connection with the execution of the Settlement Agreement and thus could not have been exploited by Petitioner after 1994 in any event.

Over and above his nonuse of the MISFITS Marks from at least 1994-1999, Petitioner’s intent not to resume use of the MISFITS Marks is abundantly demonstrated by the Settlement Agreement itself whereby Petitioner:

- Consented to Cycloplan having the exclusive right to publicly perform and record as the MISFITS going forward.

¹⁰ “Collection I” was one of the unlawful releases by Petitioner without the permission of the other contributing members of the MISFITS, which, among other things, provoked the 1992 Action. *See* Caiafa Dec., ¶ 14.

- Required that “for a period of two years [Cyclopien] shall advise all promoters of their live concerts and include in all contracts relating thereto provisions indicating that any promotional material generated in connection with performances by the Misfits identifies the current members of the band or **specifies that Danzig is not a member of the band.**”
- Required Cyclopien to specify in press releases regarding the Settlement Agreement that “**Glenn Danzig will not be a member of [the MISFITS] group**” going forward.

Kasell Dec., Ex. 1, ¶ 7 and Exhibit C (emphasis added).

In sum, the record of this proceeding establishes that Petitioner did not use the MISFITS Marks from at least 1994-1999 and did not have the intent to use the MISFITS Marks during that time. Accordingly, Petitioner abandoned any rights he may have claimed in the MISFITS Marks. Petitioner’s alleged use of the MISFITS Marks described in the exhibits to the Motion could not, as a matter of law, cure the prior abandonment. Even assuming *arguendo* that the Board would credit Petitioner’s conclusory allegation of use unsupported by any actual evidence, at a minimum, a disputed issue of material fact would exist as to the fact and scope of Petitioner’s purported use that precludes the entry of summary judgment.

D. Pursuant To Fed.R.Civ.P. 56(f), Cyclopien Requires Discovery Essential To Prove Its Affirmative Defenses That Further Precludes The Entry Of Summary Judgment

To the extent the Board does not deny Petitioner’s Motion for the many reasons described above, Rule 56(f) of the Federal Rules of Civil Procedure otherwise precludes summary judgment because Cyclopien requires discovery essential to prove its affirmative defenses in this action. Rule 56(f) of the Federal Rules of Civil Procedure provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

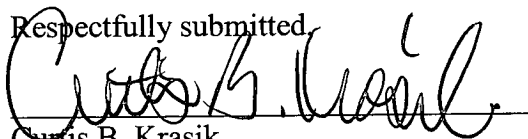
As set forth in Cycloplan's Rule 56(f) Motion and the Declaration of Curtis B. Krasik filed concurrently herewith, Cycloplan asserted certain affirmative defenses in its answer to Petitioner's Petition for Cancellation, including, but not limited to, laches, acquiescence, waiver, estoppel and unclean hands, that would completely bar Petitioner's claims in this proceeding, including those claims on which Petitioner seeks summary judgment. Because Petitioner filed his Motion days before his scheduled deposition, Cycloplan has not had the opportunity to examine Petitioner on these issues, which uniquely involve facts and circumstances within Petitioner's knowledge and possession. Accordingly, Rule 56(f) precludes the entry of summary judgment without allowing Cycloplan the opportunity to take discovery on its potentially case-dispositive affirmative defenses. *See Oprolyand USA Inc.*, 970 F.2d at 852 (refusing to grant summary judgment based on non-moving party's need for discovery pursuant to Fed.R.Civ.P. 56(f)).

IV. CONCLUSION

For all the foregoing reasons, Petitioner's Motion for Summary Judgment should be denied.

October 27, 2006

Respectfully submitted,



Curtis B. Krasik

Christopher M. Verdini

KIRKPATRICK & LOCKHART NICHOLSON

GRAHAM LLP

Henry W. Oliver Building

535 Smithfield Street

Pittsburgh, PA 15222

(412) 355-6500 (Telephone)

(412) 355-6501 (Facsimile)

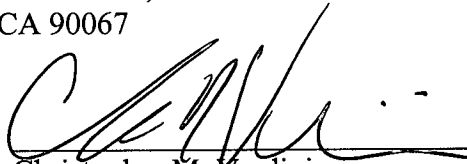
Attorneys for Registrant

Cycloplan Music, Inc.

Certificate of Service

I certify that a copy of the foregoing Registrant Cycloplan Music, Inc.'s Response in Opposition to Petitioner's Motion for Summary Judgment was served by U.S. first-class mail on October 27, 2006, on the following counsel of record for Petitioner Glenn Danzig:

Rod S. Berman
Jeffer, Mangels, Butler & Marmaro, LLP
1900 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067



Christopher M. Verdini

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GLENN DANZIG,

Petitioner,

vs.

CYCLOPIAN MUSIC, INC.,

Registrant.

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Cancellation No. 92045173

Reg. Nos. 2793533, 2634215, 2735848

Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 22313-1451

**DECLARATION OF GERALD CAIAFA
IN SUPPORT OF REGISTRANT CYCLOPIAN MUSIC, INC.'S RESPONSE IN
OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

Express Mail® Mailing Label Number 990156034

Date of Deposit October 27, 2006

I certify that this paper or fee is being deposited with the United States Postal Service
"Express Mail Post Office to Addressee" service under 37 CFR § 2.198 on the date indicated below
and is addressed to United States Patent and Trademark Office, Attn: Trademark Trial and Appeal Board, P.O. Box
1451, Alexandria, VA 22313-1451

Karen Tyler

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GLENN DANZIG,

Petitioner,

vs.

CYCLOPIAN MUSIC, INC.,

Registrant.

Cancellation No. 92045173

Reg. Nos. 2793533, 2634215, 2735848

Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

DECLARATION OF GERALD CAIAFA

I, Gerald Caiafa, declare as follows:

1. I am over eighteen (18) years of age, have personal knowledge of the matters set forth herein and am competent to testify thereto.
2. I am the principal of Cyclopien Music, Inc. ("Cyclopien") and in that capacity I manage and supervise all of Cyclopien's activities. I am also a current member of the MISFITS musical group, p/k/a "Jerry Only."
3. I am a founding member of the punk rock musical group known as the MISFITS, and I am the only person to be a member of the MISFITS throughout its existence to the present. Petitioner Glenn Danzig ("Danzig") was also a founding member of the MISFITS and remained part of the group until his departure in 1983. The MISFITS were initially formed in the late 1970's.
4. The MISFITS recorded and performed from approximately 1977 through 1983, at which time the group disbanded.

5. For a period of approximately ten (10) years after the MISFITS disbanded, Danzig unilaterally entered into a series of deals to release recordings of the MISFITS without the knowledge or consent of, and compensation to, the other contributing members of the group. After becoming aware of Danzig's unlawful conduct, I, along with the other members of the MISFITS during the 1977-1983 period, filed suit against Danzig in the United States District Court for the Southern District of New York in or around 1992 (the "1992 Action"). This lawsuit was resolved by a settlement agreement dated December 31, 1994 (the "Settlement Agreement").

6. As part of the Settlement Agreement, Paul Caiafa, Frank Licata and Julio Valverde and I were granted the exclusive right to publicly perform and record as the MISFITS. Danzig granted this exclusive right because he expected, and indeed desired, that the MISFITS would fail as a musical group without his involvement and thus wanted nothing to do with the new MISFITS project. Through separate agreements entered into right after the Settlement Agreement, the exclusive right to publicly perform and record as the MISFITS was assigned to Cycloplan.

7. Since 1994, Cycloplan and I have exclusively controlled the MISFITS as an active musical group. Over that time, the MISFITS have released four full length albums of new MISFITS recordings in addition to various other singles. The MISFITS also have promoted live concert tours throughout the United States and overseas, including Europe, South America, Asia, and Australia.

8. At the same time, Cycloplan has developed an extensive MISFITS merchandise licensing program ancillary to the MISFITS' popularity and success as an active musical group. Such licensing activities have included, but are not limited to, myriad types of MISFITS-branded

clothing, footwear, posters, stickers, buttons, pins, trading cards, action figures and skateboards and related accessories. MISFITS -branded merchandise is sold through prominent retail outlets, including Hot Topic and Virgin Megastores, as well as through Cyclopien's website at www.misfits.com.

9. The popularity and success of sales of MISFITS merchandise is derivative of the consumer recognition and goodwill Cyclopien has developed in the MISFITS as a musical group since 1995, with which Danzig has had no involvement.

10. Through these marketing efforts and with no help or contribution from Danzig, Cyclopien has expanded the audience and fan base for MISFITS goods and services. After exclusively using and exploiting the MISFITS in connection with the foregoing activities, Cyclopien applied for and was granted the registrations at issue in this cancellation proceeding.

11. Danzig has not been part of the MISFITS since the group disbanded in 1983. Danzig has not publicly performed or recorded as the MISFITS and in fact, after the MISFITS disbanded in 1983, Danzig formed two new, unrelated musical groups - Samhain and Danzig. Danzig publicly recorded and performed with these bands and still promotes and performs with the group Danzig.

12. Attached hereto as Exhibit 1 is a true and correct copy of the Catalog Purchase Agreement whereby Caroline Records obtained all rights, title and interest in the musical recordings of the MISFITS from 1977-83.

13. The compact disc depicted at Bates No. DANZ 0208 is known as "Static Age" and was released by Caroline Records in 1997. "Static Age" features MISFITS recordings from the 1977-1983 period that Caroline Records owned all rights to, including the copyrights, pursuant to the Catalog Purchase Agreement. "Static Age" was released by Caroline Records in

the same year that Cycloplan released "American Psycho" pursuant to its exclusive rights under the Settlement Agreement. Attached hereto as Exhibit 2 is a true and correct copy of the front and back cover art of the "American Psycho" compact disc.

14. The compact disc depicted at Bates No. DANZ 0212 is known as "Collection I" and was released in 1986 nearly a decade before execution of the Settlement Agreement. "Collection I" was one of the releases by Danzig without the permission of the other contributing members of the MISFITS, which in part precipitated the 1992 Action.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed in Vernon, New Jersey on October ²⁷__, 2006.

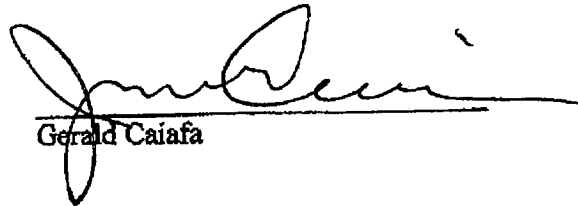

Gerald Caiafa

EXHIBIT 1

THIS AGREEMENT made effective as of the 1st day of January, 1995, by and between CAROLINE RECORDS, INC., 114 West 26th Street, New York, New York 10001 (hereinafter "Buyer") and Glenn Danzig p/k/a "Danzig" and dba Plan 9 Records (hereinafter "Danzig"), c/o Beldock, Levine & Hoffman, 99 Park Avenue, New York, NY 10016-1505, Attention: Peter S. Matorin, Esq., Gerald Caiafa, Paul Caiafa, Frank Licata and Julio Valverde (hereinafter individually and collectively "CCLV"), c/o Pryor, Cashman, Sherman & Flynn, 410 Park Avenue, New York, NY 10022, Attention: David Mantel, Esq., (hereinafter "Danzig" and "CCLV" shall hereinafter sometimes be collectively referred to as "Seller", unless specifically referred to by name).

WHEREAS, simultaneously hereto Danzig and CCLV are executing a Settlement and Release Agreement and Danzig and CCLV on the one hand and Buyer on the other are executing a Release Agreement, all with respect to that certain civil action entitled Gerald Caiafa, Paul Caiafa, Frank Licata and Julio Valverde, plaintiffs -vs- Glenn Danzig p/k/a "Danzig" and dba Plan 9 Records and Caroline Records, Defendants, United States District Court, Southern District of New York, Case No. 92 CIV. 6908 (LP) (hereinafter collectively the "Settlement and Release Agreement").

WHEREAS, Seller desires to sell and Buyer desires to purchase those certain master recordings as set forth below on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual promises and covenants hereinafter set forth, the parties hereto agree as follows:

1. On the terms and subject to the conditions of this agreement, Seller hereby sells, assigns, transfers and sets over to Buyer, all of the Seller's right, title and interest in and to all the master recordings (excluding the Slash LP and the Other Masters, as such terms are defined below) embodying the performances of the recording group publicly known as The Misfits which were recorded prior to the date hereof, including, but not limited to, the master recordings set forth on Schedule "A" hereof (hereinafter referred to as the "Masters") containing the musical performances of Glenn Danzig, Gerald Caiafa, Paul Caiafa, Frank Licata and Julio Valverde p/k/a "The Misfits" (individually and collectively referred to as the "Artist"), it being understood, that all master recordings embodying the performances of Artist as members of The Misfits which are owned or controlled

by Seller, (other than the Slash LP and Other Masters) are being transferred to Buyer hereunder. The sale of such Masters to Buyer shall include all copyrights therein and thereto in the Masters and the right to secure such copyright perpetually and throughout the world (hereinafter the "Territory") in the name of Buyer, free and clear of any liens, encumbrances or claims, and all master tapes, demo recordings, videos or any other audio and audio/visual recordings featuring the performances of the Artist as members of the recording group known as "The Misfits" which are owned now by Seller of any kind or nature (all such aforementioned Masters, copyrights and other materials shall be collectively referred to as the "Assets"). Seller hereby also sells, assigns, transfers and sets over to Buyer all future earnings which shall be due or payable with regard to the exploitation and sale of the Assets or which pertain to the Assets. Seller further sells to Buyer all claims, choices in action, debts owing to, receivables, accounts, royalties, advances or any other monies in connection with the use or exploitation of the Masters from and after the date hereof.

2. Seller represents and warrants that prior to the date hereto Seller has not conveyed any right, title or interest of any kind or nature in or to the Assets to any other person, party or company in the Territory. Seller further represents and warrants that after the date hereof, Seller or their assigns or licensees shall not exploit, market or sell the Assets, or any part thereof.

3. (a) On complete delivery of the Assets, as hereinafter defined, and execution of the Assignment of Copyright, as attached hereto as Exhibit "A", Buyer shall pay to Seller the sum of One Million Four Hundred Fifty Thousand (\$1,450,000) Dollars as consideration for the grant of rights to the Assets (the "Initial Advance"), provided that the sum of Eight Hundred Thousand (\$800,000) Dollars of the Initial Advance shall be recoupable from the amounts payable pursuant to the provisions of paragraph 4 below (the "Initial Recoupable Advance").

(b) Solely in the event that the Initial Recoupable Advance is recouped from the royalties payable pursuant to the provisions of paragraph 4 below at any time within twenty-four (24) months of the effective date hereof, Buyer shall pay to Seller an amount equal to fifty (50%) percent of the reported royalties earned from the exploitation of the Masters during the twelve (12) month period immediately preceding the recoupment of the Initial Recoupable Advance (the "Second Recoupable Advance").

(c) Solely in the event that the Second Recoupable Advance is recouped from the royalties payable pursuant to the provisions of paragraph 4 below within twenty-four (24) months of

the payment of the Second Recoupable Advance, Buyer shall pay to Seller an amount equal to fifty (50%) percent of the reported royalties earned from the exploitation of the Masters during the twelve (12) month period immediately preceding the recoupment of the Second Recoupable Advance.

4. (a) Buyer shall pay to Seller on Net Sales of Phonograph Records embodying Masters a royalty computed by multiplying the Suggested Retail list Price ("SRLP") less the deductions hereafter provided by the applicable royalty rate set forth below:

(i) On Phonograph Records sold in the United States the royalty rate shall be:

(1) Sixteen (16%) percent on LPs.

(2) Twelve (12%) percent on Singles.

(ii) On Phonograph Records sold outside of the United States, the royalty rate shall be:

(1) Thirteen and six-tenths (13.6%) percent on LPs and Ten and two-tenths (10.2%) percent on Singles sold in Canada.

(2) Twelve and eight tenths (12.8%) percent on LPs and Nine and six-tenths (9.6%) percent on Singles sold in the United Kingdom, Germany and Japan.

(3) Twelve (12%) percent on LPs and Nine (9%) on Singles sold in France, Belgium, The Netherlands, Luxembourg, Norway, Denmark and Sweden.

(4) Nine and six tenths (9.6%) percent on LPs and Seven and two tenths (7.2%) percent on Singles sold throughout the Territory outside of those countries set forth in subparagraphs 4(a)(i), 4(a)(ii)(1), 4(a)(ii)(2) and 4(a)(ii)(3).

(b) Notwithstanding the foregoing:

(i) On Phonograph Records sold outside normal retail distribution channels through a direct mail or mail order distribution method (including, without limitation, through so-called "record clubs"), through retail stores in connection with special radio or television advertisements (sometimes referred to as "key outlet marketing"), or through any combination of the foregoing, the royalty rate shall be one-half (1/2) of the otherwise applicable royalty rate.

(ii) On Phonograph Records sold for use as premiums or in connection with the sale, advertising, or promotion of any other product or service (it being understood that no such Phonograph Record embodying solely Masters shall be sold by Buyer without Seller's prior written consent), the royalty rate shall be one-half ($1/2$) of the otherwise applicable royalty rate and the SRLP of those Phonograph Records shall be deemed to be an amount equal to the monies actually received by Buyer from the sale of those Phonograph Records, unless manufactured and sold by a licensee of Buyer, in which event the SRLP shall be deemed to be the price used by that licensee in accounting to Buyer.

(iii) On Mid-Price Records the royalty rate shall be two-thirds ($2/3$) of the otherwise applicable royalty rate, and on Budget Records the royalty rate shall be one-half ($1/2$) of the otherwise applicable royalty rate.

(iv) (A) On Phonograph Records sold to the United States Government, its subdivisions, departments or agencies (excluding Phonograph Records sold for resale through military facilities) or to educational institutions or libraries, the royalty rate shall be one-half ($1/2$) of the otherwise applicable royalty rate.

(B) On Phonograph Records sold for resale through military facilities, the royalty rate shall be three-quarters ($3/4$) of the otherwise applicable royalty rate.

(v) On Long-Play Singles and on EPs the royalty rate shall be three-quarters ($3/4$) of the otherwise applicable royalty rate for LPs.

(vi) On Multiple LPs, the royalty rate shall be the lesser of: (A) the otherwise applicable royalty rate for the configuration concerned (eg. cassette or compact disc) and (B) the otherwise applicable royalty rate for the configuration concerned multiplied by a fraction, the numerator of which is the SRLP of the Multiple LP and the denominator of which is the product of the SRLP of a top-line single-disc LP and the number of discs contained in the Multiple LP.

(vii) On Digital Records (other than the Sony Mini Disc, the Digital Compact Cassette [DCC] or DAT or other New Medium Record), the royalty rate shall be one hundred (100%) percent of the otherwise applicable royalty rate.

(viii) On Masters licensed by Buyer to non-affiliated licensees on a flat-fee basis for their manufacture and sale of Phonograph Records or for any other uses

Seller's royalty shall be an amount equal to fifty percent (50%) of the Net Flat-Fee from the sale of those Phonograph Records or from those other uses of the Masters.

(ix) With respect to records sold via television and/or radio advertisements through mail order, telephone order or special retail outlets (such as "K-Tel" type packages), by Buyer's licensees, the royalty shall be one-half (1/2) of the net receipts received by Buyer from Buyer's licensees less any royalties payable to producers or other royalty participants with respect to such sales, if any. Notwithstanding the foregoing, in the event that Buyer shall sell records directly (and not through licensees) via television and/or radio advertisements through mail or phone order in the United States, then such sales, for purposes of this paragraph, shall be deemed sales through normal retail channels and, accordingly, Seller shall be paid royalties with respect thereto in accordance with paragraph 4(a)(i) hereof but only with respect to eighty-five (85%) percent of such net sales. Buyer agrees that the intention of the foregoing sentence is that Seller shall be paid the same amount with respect to each record actually distributed in the manner described therein as Seller are paid with respect to all records shipped (including for such purpose all records shipped as so called regular Album free goods, but excluding so called special Album free goods) through normal retail channels in the United States.

(x) In the event that Buyer shall sell or license third parties to sell "records" via telephone, satellite, cable or other direct transmission to the consumer over wire or through the air, such sales shall be deemed sales of such "records" through normal retail channels for all purposes and, accordingly, Seller shall be paid royalties with respect thereto at the rates and in the manner set forth in paragraph 4(a), as applicable, but with respect to any such sales in the United States royalties shall only be paid with respect to eighty-five (85%) percent of such sales. For purposes of calculating royalties payable in connection with such sales, the SRLP of such "records" shall be deemed to be the then-current SRLP of compact disc copies of such records, and the same packaging deduction shall be made for such sales in accordance with paragraph 4(c)(iii)(2) as is applicable to compact disc copies of such records. Buyer agrees that the intention of this subparagraph is that Seller shall be paid the same amount with respect to each "record" actually distributed in the manner described herein as Seller are paid with respect to all records sold through normal retail channels in the United States.

(xi) On Masters licensed by Buyer to non-affiliated licensees on a royalty basis for their manufacture and sale of Phonograph Records in the United States, Seller's

royalty shall be an amount equal to one-half (1/2) of the Net Royalty received and not returned from the sale of those Phonograph Records.

(xii) On Masters promoted or advertised by means of paid television or radio advertising in the Territory outside of the United States, Seller's royalty shall be one half (1/2) of the otherwise applicable royalty, provided that such rate shall only be applicable from the accounting period in which such television campaign commences through one full accounting period following the accounting period in which such television campaign ends.

(xiii) Notwithstanding any provision to the contrary contained herein, the royalty rate for each country of the Territory in respect of net sales through normal retail channels of copies of any record in any New Medium configuration ("NM Sales") shall be (A) with respect to NM Sales in a particular New Medium occurring during the "Introductory Period" (as such term is hereinafter defined) applicable to that New Medium, eighty percent (80%) of the royalty rate applicable to the first net sale of such record through normal retail channels in the applicable country pursuant to this agreement based upon the SRLP of such album in such NM configuration and (B) with respect to NM Sales in a particular New Medium occurring after the Introductory Period applicable to that New Medium, in the event that Buyer increases such royalty rate for such NM configuration for a majority of its recording artists to a royalty rate greater than eighty (80%) percent of the otherwise applicable royalty rate, then the royalty rate payable hereunder in respect of Net Sales of any record in such New Medium shall be increased to such greater royalty rate; provided, however in no event will the percentage royalty rate applicable to NM Sales hereunder occurring after the Introductory Period applicable to any New Medium exceed one hundred percent (100%) of the royalty rate applicable to the first net sale of the applicable record through normal retail channels in the applicable country pursuant to this agreement based upon the SRLP of the applicable album in such New Medium; and provided further that the provisions of this paragraph 4(b)(xiii) are not intended to restrict Buyer's rights hereunder to release, manufacture, sell, advertise and promote records hereunder in a particular New Medium after the Introductory Period applicable to that New Medium. Except as provided to the contrary in this paragraph 4(b)(xiii), the royalty payable hereunder in respect of net sales of records in any New Medium configuration record shall be prorated, reduced, computed and paid in accordance with the provisions of this agreement. As used herein, the term "Introductory Period" shall mean, on a New Medium-by-New Medium basis, that period commencing on the applicable "Commencement Date" (as such term is

hereinafter defined) and ending two (2) years thereafter. As used herein, the term "Commencement Date" shall mean, on a New Medium-by-New Medium basis, the applicable of the following: (AA) if the first phonograph record released by Buyer in the United States in the applicable New Medium (irrespective of the identity of the recording artist whose performance is embodied thereon) is released during the first three (3) months of a particular semi-annual accounting period, the Commencement Date of the Introductory Period applicable to such New Medium shall be the first day of the semi-annual accounting period in which such release occurs and (BB) if Buyer's aforesaid first release in such New Medium shall be during the last three (3) months of a particular semi-annual accounting period the Commencement Date of the Introductory Period applicable to such New Medium shall be the first day of the semi-annual accounting period immediately following the semi-annual accounting period in which such release occurs. As used herein, a record in a New Medium means a record in any medium which is not in general commercial distribution in the United States as of the date hereof. As used herein, New Medium records shall specifically include so-called "DAT", "DCC" and Sony "Mini-discs".

(c) Notwithstanding the foregoing:

(i). No royalties shall be payable on Phonograph Records furnished as free or bonus Phonograph Records to members, applicants, or other participants in any record club or other direct mail distribution method; on Phonograph Records distributed for promotional purposes to radio stations, television stations or networks, record reviewers, or other customary recipients of promotional Phonograph Records; on so-called "promotional sampler" Phonograph Records; on Phonograph Records sold as scrap or as "cut-outs"; or on Phonograph Records (whether or not intended for sale by the recipient) furnished on a no charge or free basis (such as, but not limited to Phonograph Records commonly described in the record industry as "free goods" or "freebies") or sold at less than fifty percent (50%) of their regular wholesale price to distributors, subdistributors, dealers, or others, whether or not the recipient thereof is affiliated with us. Buyer and Seller agree that, with respect to the sales of each LP in the United States (for purposes of this paragraph LPs will also include EPs), fifteen (15%) percent during the first three (3) accounting periods, and ten (10%) percent during all subsequent accounting periods, of the aggregate units of each LP and EP sold or shipped by Buyer will be deemed to be free goods. With respect to each Single record, thirty-five (35%) percent of the aggregate units of each Single sold or shipped by Buyer will be deemed to be free goods. In addition, from time to time in connection with short-term or other special sales programs (hereinafter individually referred

to as a "Campaign"), Buyer will have the right to ship during the first three (3) accounting periods following the release of such phonograph record, as free goods up to an additional ten (10%) percent of records shipped during any such Campaign as Buyer in the exercise of its good faith business judgment determines.

(ii) Royalties on Phonograph Records (whether or not intended for sale by the recipient) sold at a discount to distributors, subdistributors, dealers, or others, whether or not affiliated with Buyer (except for Phonograph Records sold at less than fifty [50%] percent of their regular wholesale price, for which no royalties are payable hereunder) shall be reduced in the same proportion as the regular wholesale price of those Phonograph Records is reduced on those sales. Other than with respect to the distribution of Phonograph Records hereunder through special sales programs or other similar marketing plans, Buyer shall not both discount and distribute Phonograph Records in the United States hereunder on a "no-charge" basis that are intended for sale by the recipients thereof and reduce the royalty rate thereon pursuant to the provisions of this subparagraph 4(c)(ii) in respect of those Records if the net effect of that combination shall be to exceed Buyer's then-current company policy with respect to the distribution of Records on a "no-charge" basis for sale by the recipient thereof as set forth in subparagraph 4(c)(i) above, as such policy may change from time to time.

(iii) (1) For purposes of computing royalties, there shall be deducted from the SRLP (or other applicable price, if any, upon which royalties are calculated) of Phonograph Records hereunder an amount equal to any excise, sales, value added, or comparable or similar taxes actually included in the price.

(2) Twenty-five (25%) percent of the retail list price for seven and twelve-inch vinyl disc singles in custom printed sleeves, fifteen (15%) percent of the retail list price for records in analog pre-recorded tape form, (c) twenty-five (25%) percent of the retail list price for vinyl disc Lps, compact disc Singles and cassette Singles, and twenty-five (25%) percent of the retail list price for double Lps, Digital Records and New Medium Records. Notwithstanding the foregoing, there will be no packaging deduction for Singles in vinyl disc form packages in Buyer's standard stock paper Singles sleeves (without inserts or special elements).

(iv) Royalties shall be computed and paid upon one hundred (100%) percent of Net Sales of all records for which payment has been received; provided, that if any licensee distributing Phonograph Records hereunder through record clubs or

other methods of mail order distribution shall compute and pay royalties to us on those Phonograph Records on less than one hundred (100%) percent of Net Sales, your royalties hereunder on those Phonograph Records shall be computed and paid on the same percentage of sales as that licensee shall utilize in computing and paying to us royalties on those Phonograph Records.

(v) Phonograph Records distributed in the United States by any of Buyer's affiliated branch wholesalers shall be deemed sold for the purposes of this Contract only if sold by that affiliated branch wholesaler to one of its independent third party customers.

(vi) The royalty payable to Seller hereunder on a Phonograph Record or other device embodying Masters together with other master recordings shall be computed by multiplying the otherwise applicable royalty rate by a fraction, the numerator of which shall be the number of Selections contained on the Masters which are embodied on that Phonograph Record or other device and the denominator of which shall be the total number of Selections embodied on that Phonograph Record or other device.

(d) Notwithstanding anything to the contrary contained herein with respect to records sold in any country of the Territory in which governmental or other authorities place limits on the royalty rates permissible for remittances to the United States in respect of records sold therein, the royalty rate payable to Seller hereunder in respect of sales of records in each such territory shall equal the lesser of (A) the otherwise-applicable royalty rate payable in respect of records sold therein, and (B) the effective royalty rate permitted by such governmental or other authority for remittances to the United States, less (C) the sum of (1) a royalty equivalent to three (3%) percent of the retail list price (or other applicable base against which the applicable royalty percentage rate is applied pursuant to the terms hereof).

(e) Buyer may at any time elect to utilize a different method of computing royalties from that specified above so long as such method or methods are applicable to substantially all recordings released by Buyer, and provided that no such method reduces the net monies due Seller. In the event that Buyer shall no longer designate an SRLP for records hereunder in any particular configuration (e.g. vinyl disc albums, cassette tape albums, 7-inch single records, 12-inch single records, compact discs, Mini-Lps) and price category (e.g. full-price, mid-price and budget records) in the United States, then for the purpose of computing royalties hereunder with respect to sales of records in such configuration and price category through normal retail channels in the United States, the SRLP of such records in such

configuration and price category shall be deemed to be a dollar amount computed by multiplying Buyer's price to subdistributors (before consideration of any discount resulting from the distribution of Free Goods) for such records in such configuration and price category by a fraction, the numerator of which is the SRLP for the majority of Buyer's records in such configuration and price category as of the date when Buyer cease to designate an SRLP for records in such configuration and price category, and the denominator of which is Buyer's price (or Buyer's distributor's price) to subdistributors for the majority of Buyer's records in such configuration and price category as of the date when Buyer cease to designate an SRLP for records in such configuration and price category (before consideration of any discount resulting from the distribution of Free Goods).

5. (a) All monies payable to Seller hereunder shall be payable as follows:

(i) As to the Initial Advance, the sum of One Million Three Hundred Seventy-Five Thousand (\$1,375,000) to Pryor, Cashman, Sherman & Flynn on behalf of CCLV and the sum of Seventy-Five Thousand (\$75,000) to Danzig.

(ii) As to all other sums payable hereunder, if any, other than royalties payable pursuant to the provisions of paragraph 6 hereof, forty (40%) percent of all such sums shall be payable to Danzig and sixty (60%) percent of all such sums shall be payable to CCLV.

(b) Buyer shall send to Danzig and CCLV separate statements for their respective share of royalties payable hereunder on or before September 30th for the semiannual period ending the preceding June 30th and on or before March 31st for the semiannual period ending the preceding December 31st, together with payment of the respective shares of royalties, if any, earned by Danzig and CCLV hereunder during the semiannual period for which the statement is rendered, less all advances and charges under this Contract. Buyer shall have the right to retain, as a reserve against charges, credits, or returns, such portion of payable royalties as shall be reasonable in Buyer's best business judgment, provided that in no event shall any such reserve exceed twenty five (25%) percent of royalties payable with respect to Lps and fifty (50%) percent of royalties payable with respect to Singles. The first fifty (50%) percent of each such reserve shall be liquidated no later than with the rendition of the third (3rd) accounting statement following the statement upon which such reserve was established. The balance of each such reserve shall be liquidated no later than with the rendition of the fourth (4th) accounting statement following the statement upon which such reserve was established. Returns of Phonograph

Records hereunder shall be pro-rated between Phonograph Records sold and Phonograph Records furnished on a "no-charge" basis for resale by recipients thereof in the same proportion as same were initially shipped. Seller shall reimburse Buyer on demand for any overpayments, and Buyer may also deduct the amount thereof from any royalties payable to Seller hereunder. Royalties paid by Buyer on Phonograph Records subsequently returned shall be deemed overpayments.

(c) No royalties shall be payable to Seller on sales of Phonograph Records by any of Buyer's licensees until payment on those sales has been received by Buyer. Sales by a licensee shall be deemed to have occurred in the semi-annual accounting period during which that licensee shall have rendered to Buyer accounting statements and payments for those sales. Buyer shall use Buyer's reasonable efforts to collect all monies payable to Buyer by Buyer's licensees.

(d) If Buyer shall not receive payment in United States dollars in the United States for any sales of Phonograph Records outside of the United States, royalties on those sales shall not be credited to Seller's royalty account hereunder. Buyer shall, however, if Buyer are able to do so, accept payment for those sales in foreign currency and shall deposit in a foreign bank or other depository of Seller's choice, at Seller's expense, in that foreign currency, that portion thereof, if any, as shall equal the royalties which would have been payable to Seller hereunder on those sales had payment for those sales been made to Buyer in United States dollars in the United States. Deposit as aforesaid shall fulfill Buyer's royalty obligations hereunder as to those sales.

(e) Seller shall be deemed to have consented to all royalty statements and all other accountings rendered by Buyer hereunder and each royalty statement and other accounting shall be conclusive, final, and binding, shall constitute an account stated, and shall not be subject to any objection for any reason whatsoever unless Seller give Buyer notice stating the specific basis for that objection within two (2) years after the date rendered. Seller may not maintain an action, suit, or proceeding of any nature against Buyer in respect of any royalty statement or other accounting rendered by Buyer hereunder (or in respect of the accounting period to which it relates) unless Seller commence that action, suit, or proceeding against Buyer in a court of competent jurisdiction within three (3) years after the date rendered.

(f) Buyer shall maintain books and records concerning the sale of Phonograph Records or other exploitation of the Masters or Assets hereunder. An independent certified public

accountant on Seller's behalf may, at Seller's own expense, examine and make extracts of those relevant books and records (but may not examine any of Buyer's books or records relating to the manufacture of Phonograph Records hereunder) solely for the purpose of verifying the accuracy of royalty statements and other accountings rendered by Buyer hereunder, only during Buyer's normal business hours and only upon reasonable written notice. Buyer's books and records relating to a particular royalty statement or other accounting may be examined only within two (2) years after the date rendered. Buyer shall have no obligation to permit Seller to examine Buyer's books or other accounting more than once per year. Such examination shall be conditioned upon the accountant's agreement to Buyer that he will not voluntarily disclose any findings to any person other than Seller, or Seller's attorney or other advisors and that he is not being compensated on a contingent fee basis. Further upon the conclusion of such audit, Seller shall immediately submit to Buyer a copy of the audit report prepared by such accountant. The rights hereinabove granted to Seller shall constitute Seller's sole and exclusive rights to examine Buyer's books and records.

(g) Buyer shall have the right to deduct from any amounts payable to Seller hereunder that portion thereof as may be required to be deducted under any statute, regulation, treaty or other law, and Seller shall promptly execute and deliver to Buyer any forms or other documents as may be required in connection therewith.

(h) (i) Each payment made by Buyer to Danzig under this Contract, shall be made by a single check payable to Glenn Danzig d/b/a Plan 9 Records.

(ii) Each payment made by Buyer to CCLV under this Contract subject to the provisions of Paragraph 5(a)(i) above shall be made by a single check payable to Gerald Caiafa, Paul Caiafa, Frank Licata and Julio Valverde.

6. (a) Danzig hereby grants to Buyer and Buyer's designees the irrevocable nonexclusive right to reproduce each Controlled Composition on Phonograph Records and to distribute those Phonograph Records in the United States and Canada. At Buyer's election, Danzig's execution of this agreement shall constitute the issuance of any applicable license required to be given by Danzig pursuant to this paragraph 6 (a) by any music publishing company which is owned or controlled by Danzig. In the event that Danzig shall fail to cause any such music publishing company to issue any such license to Buyer to use any Controlled Composition as aforesaid, and if Buyer shall thereupon pay any fee to such music publishing company in order to obtain

any such license, then Buyer shall have the right to deduct the amount of such license fee from any monies otherwise payable to Danzig hereunder.

(b) Mechanical Royalties shall be payable for each Controlled Composition on Net Sales of Phonograph Records and at the following rates:

(i) On Phonograph Records sold in the United States, the rate for each Controlled Composition embodied thereon shall be the United States Mechanical Rate. The "United States Mechanical Rate" shall mean an amount equal to the minimum statutory royalty rate (without regard to playing time) provided for in the United States Copyright Act which is applicable to the reproduction of Musical Compositions as of the date hereof, provided however that with respect to each Controlled Composition embodied on Phonograph Records which have never been released on Phonograph Records (e.g. a compilation album which is released for the first time subsequent to the date hereof), the United States Mechanical Rate shall mean an amount equal to the minimum statutory rate (without regard to playing time) provided for in the United States Copyright Act which is applicable to the reproduction of Musical Compositions as of the date of the initial release by Buyer of such Controlled Composition on such phonograph record .

(ii) On Phonograph Records sold in Canada, the rate for each Controlled Composition embodied thereon shall be the Canadian Mechanical Rate. As used herein the Canadian Mechanical Rate shall mean:

(1) If the copyright law of Canada provides for a minimum compulsory rate, the minimum compulsory mechanical license rate (without regard to playing time) applicable to the use of musical works under the copyright law of Canada as of the date hereof, provided however that with respect to each Controlled Composition embodied on Phonograph Records which have never been released on Phonograph Records (e.g. a compilation album which is released for the first time subsequent to the date hereof), the Canadian Mechanical Rate shall mean an amount equal to the minimum statutory rate (without regard to playing time) applicable to the use of musical works under the copyright law of Canada as of the date of the initial release by Buyer of such Controlled Composition on such phonograph record; or

(2) If the copyright law of Canada does not provide for a minimum compulsory rate, but the majority of the major record companies (including our Canadian licensee) and the majority of the major music publishers in Canada (collectively the "Canadian Record Industry") have agreed to a mechanical

license rate, the rate equal to the minimum license rate (without regard to playing time) agreed to as of the date hereof, provided however that with respect to each Controlled Composition embodied on Phonograph Records (e.g. a compilation album which is released for the first time subsequent to the date hereof) have never been released on Phonograph Records, the Canadian Mechanical Rate shall mean an amount equal to the agreed to mechanical license rate determined as of the date of the initial release by Buyer of such Controlled Composition on such phonograph record; or

(3) Notwithstanding the foregoing to the contrary, if the copyright law of Canada does not provide for a minimum compulsory license rate, and the Canadian Record Industry has not agreed to a rate, the rate applicable under this paragraph 6 (b) (ii) will be six cents (\$.06) (Canadian) per selection; and

(c) Notwithstanding the foregoing:

(i) The mechanical royalty rate for a Controlled Composition, contained on a Mid-Priced Record or Budget Record shall be three-fourths (3/4ths) of the United States Mechanical Rate ("the Adjusted United States Mechanical Rate") or the Canadian Mechanical Rate ("the Adjusted Canadian Mechanical Rate"), as applicable; no copyright royalty shall be payable in respect of Controlled Compositions which are arrangements of Selections in the public domain, except to the extent allowable under the applicable ASCAP or BMI formula for new or additional material, and then only if Danzig provide Buyer with an appropriate letter from the applicable society; and no mechanical royalties shall be payable on any Phonograph Records for which no royalties are payable pursuant to paragraph 4 above or with respect to any Controlled Composition which is one (1) minute or less in duration. Notwithstanding anything to the contrary contained herein, Buyer shall not be obligated to pay more than one (1) mechanical copyright royalty with respect to the use of any particular Composition on a particular record hereunder.

(ii) The maximum aggregate mechanical royalty rate for all Selections, including Controlled Compositions, contained on a Phonograph Record for sales in the United States shall, regardless of the number of Selections contained thereon, be the product of (A) the United States Mechanical Rate (or the Adjusted United States Mechanical Rate, as applicable) and (B) twelve (12) for an LP (containing one (1) disc, tape, compact disc or digital audio tape equivalent), five (5) for an EP, two (2) for a Single and three (3) for a Long-Play Single. With respect to multiple Lps, the maximum aggregate mechanical royalty rate payable by Buyer with respect thereto, regardless of the number of selections embodied therein or the playing time thereof, shall be

the Maximum Aggregate Multiple LP Rate. As used herein, the "Maximum Aggregate Multiple LP Rate" for a particular multiple LP shall be the maximum aggregate mechanical royalty rate which would be applicable to a single disc LP released on the date such multiple LP was released multiplied by a fraction, the numerator of which is the suggested retail list price of such multiple LP in disc form and the denominator of which is Buyer's then prevailing suggested retail list price for single disc albums. The maximum aggregate mechanical royalty rate for all Selections, including Controlled Compositions, contained on a Phonograph Record for sales in Canada shall, regardless of the number of Selections contained thereon, be the product of (A) the Canadian Mechanical Rate (or the Adjusted Canadian Mechanical Rate, as applicable) and (B) twelve (12) for an LP (containing one (1) disc, tape, compact disc or digital audio tape equivalent), five (5) for an EP, two (2) for a Single and three (3) for a Long-Play Single. If the aggregate mechanical royalty rate applicable to all of the Selections embodied on any Phonograph Record hereunder shall exceed the applicable maximum aggregate royalty rate set forth above for that Phonograph Record, then the aggregate mechanical royalty rate for the Controlled Compositions, if any, contained thereon shall be reduced by an amount equal to such excess. If the aggregate mechanical royalty rate applicable to all of the Selections embodied on that Phonograph record shall, even as reduced in accordance with the immediately preceding sentence, still exceed the applicable maximum aggregate mechanical royalty rate for that Phonograph Record then Danzig shall, upon Buyer's demand, pay Buyer an amount equal to the additional mechanical royalties payable as a result of that excess and Buyer may, in addition to all of Buyer's other rights or remedies, deduct that amount from any monies payable by Buyer to Danzig hereunder.

(d) Buyer shall account and pay mechanical royalties on Controlled Compositions in accordance with the provisions of subparagraphs (a), (d), (e), (f) and (g) of paragraph 5 above.

(e) Danzig shall, upon Buyer's request, cause the issuance to Buyer and Buyer's designees of mechanical licenses to reproduce on Phonograph Records Selections which are not Controlled Compositions and to distribute those Phonograph Records in the United States and Canada. Those mechanical licenses shall be at rates and on terms no less favorable to Buyer and Buyer's designees than those contained in the standard mechanical license issued by The Harry Fox Agency, Inc. or any successor with respect to Phonograph Records distributed in the United States and by CMRRA or any successor with respect to Phonograph Records distributed in Canada; provided, however, in no event shall those rates exceed one hundred percent (100%) of the applicable minimum statutory rates. Danzig shall also, upon

Buyer's request, cause the issuance to Buyer and Buyer's designees of mechanical licenses to reproduce Selections on Phonograph Records hereunder and to distribute those Phonograph Records outside the United States and Canada on terms no less favorable to Buyer and Buyer's designees than those generally applicable to Phonograph Record manufacturers in each country in question. The obligation to account and pay mechanical royalties on sales of Phonograph Records outside of the United States and Canada shall be that of Buyer's licensees.

(f) If the copyright in any Controlled Composition is owned or controlled by a person, firm or corporation other than Danzig, Danzig shall cause that person, firm or corporation to grant to Buyer and Buyer's designees the same rights as Danzig is required to grant to Buyer and Buyer's designees pursuant to this paragraph.

(g) Any assignment, license or other agreement made with respect to Controlled Compositions shall be subject to the terms hereof.

(h) Danzig grants to Buyer and Buyer's designees the irrevocable, non-exclusive right to print and reproduce, at Buyer's election, the title and lyrics to each Controlled Composition embodied in a Master on the packaging of Phonograph Records embodying Masters throughout the Territory in perpetuity, without payment to Danzig or any other person, firm or corporation of any monies or other consideration in connection therewith. Danzig also shall cause to be granted to Buyer and Buyer's designees the irrevocable, non-exclusive right to print and reproduce, at Buyer's election, the title and lyrics to each Selection that is not a Controlled Composition embodied in a Master on the packaging of Phonograph Records embodying Masters throughout the Territory in perpetuity without payment to Danzig or any other person, firm or corporation of any monies or other consideration in connection therewith. If Buyer are required to pay monies to any person, firm or corporation for the printing or reproduction of the title or lyrics of any Selection recorded in a Master on the packaging of Phonograph Records embodying Masters, then Danzig shall, upon Buyer's demand, pay to Buyer an amount equal to those monies paid by Buyer in connection therewith and Buyer may, in addition to all of Buyer's other rights or remedies, deduct that amount from any monies payable by Buyer hereunder.

(i) Danzig hereby grants to Buyer and Buyer's designees the irrevocable right to reproduce each Controlled Composition in Videos (as that term is hereafter defined), to reproduce such Videos, distribute them in any manner (including, without limitation, publicly and for profit), to manufacture and

distribute Audiovisual Records and other copies of them, and to exploit them otherwise, by any method and in any form known now or in the future, throughout the world, and authorize others to do so (including, without limitation, on television, whether free, pay cable or pay per view, theatrically or non-theatrically). Neither Buyer, or any of Buyer's licensees, will be required to make any payment in connection with those uses even if Buyer (or Buyer's licensees) receive any payment in connection with any uses of the Videos embodying the Controlled Compositions as aforesaid. Danzig's execution of this agreement shall constitute the issuance of any applicable license required to be given by Danzig pursuant to this paragraph 6 (i) by any music publishing company which is owned or controlled by Danzig. In the event that Danzig shall fail to cause any such music publishing company to issue any such license to Buyer to use any Controlled Composition in Videos as aforesaid, and if Buyer shall thereupon pay any fee to such music publishing company in order to obtain any such license, then Buyer shall have the right to deduct the amount of such license fee from any monies otherwise payable to Danzig hereunder or under any other agreement between Buyer and Seller.

7. The following words shall, where the context allows, have the following meanings whether such words shall appear in lower case or with the first letter of each word capitalized (the foregoing shall apply to all other defined terms used herein):

(a) The term "Audio-Visual Record" shall mean a Phonograph Record embodying visual images.

(b) The term "Audio-Visual Recording" shall mean a Master Recording embodying visual images.

(c) The term "Budget Record" shall mean a Phonograph Record which bears an SRLP in any particular configuration in the country in question which is at least thirty-three (33%) percent lower than the SRLP of the majority of Buyer's (or Buyer's affiliates or licensees) then-current newly-released top-price records in such configuration.

(d) The term "Controlled Composition" shall mean that portion of a Musical Composition or other Selection, written or composed by Artist, or any producer of the Masters or which is owned or controlled, in whole or in part, directly or indirectly, by Artist, any of the producers of the Masters or any person firm or corporation in which Artist or any producer of the Masters have a direct or an indirect interest other than as a shareholder in a public corporation.

(e) Intentionally Deleted.

(f) The term "delivery to Buyer" or words of similar connotation used in connection with Master Recordings or Masters shall mean delivery to our record production manager at Buyer's offices in New York, New York of fully-mixed, leadered, sequenced and equalized 30 ips master tapes or 1630 Digital Master in proper form for the production of the parts necessary to manufacture Phonograph Records therefrom and delivery to Buyer at Buyer's offices in New York, New York of all consents (including, without limitation, clearances for the use of any Sample), approvals, copy and publishing information, credits, first use mechanical licenses and other materials and documents reasonably required by Buyer to release Phonograph Records embodying those Master Recordings or Master and to manufacture album covers or other packaging therefor.

(g) The words "Digital Record" shall mean a record the signals of which are encoded and decoded by so-called "digital" technology whether now known or hereafter devised as opposed to so-called "analog" technology, and shall include without limitation Compact Discs, Digital Audio Tape records and Digital Compact Cassettes.

(h) The term "EP" or "Mini-LP" shall mean a 12-inch 33-1/3 rpm or 45 rpm disc Phonograph Record, or its tape, Digital Record or New Medium equivalent, embodying no fewer than four (4) Musical Compositions and no more than six (6) Musical Compositions.

(i) The term "Long-Play Single" shall mean a 12-inch 33-1/3 rpm or 45 rpm disc Phonograph Record, or its tape, Digital Record or New Medium equivalent, embodying no more than three (3) Musical Compositions.

(j) The terms "LP" and "album" shall mean a 12-inch 33-1/3 rpm long-playing disc Phonograph Record of no fewer than thirty-two (32) minutes in duration, or its tape, Digital Record or New Medium equivalent, and, where the context requires, Masters sufficient to constitute a 12-inch 33-1/3 long-playing disc Phonograph Record of no fewer than thirty-two (32) minutes, or its tape equivalent.

(k) The term "Master Recording" shall mean every form of recording (whether now known or unknown), embodying sound alone, or sound accompanied by visual images, which may be used in the recording, production or manufacture of Phonograph Records.

(l) The term "Mid-Priced Record" shall mean a Phonograph Record bearing an SRLP in any particular configuration in the country in question of at least twenty (20%) percent lower

but not more than thirty-two (32%) percent lower than the SRLP of the majority of Buyer's (or Buyer's licensees or affiliates, as applicable) then-current, newly-released top-price records in such configuration.

(m) The term "Multiple LP" shall mean a single package containing two (2) or more Lps, or their tape, Digital Record or New Medium equivalent, which is sold as a single unit, and where the context requires, Master Recording sufficient to constitute a single package containing two (2) or more Lps, or their tape, Digital Record or New Medium equivalent, which is sold as a single unit.

(n) The terms "Musical Composition" and "Composition" shall mean a single musical composition and, for the purposes of computing mechanical royalties hereunder, shall include a medley.

(o) The terms "Net Royalty", "Net Flat-Fee" or "Net Receipts" shall mean the royalty, flat-fee, or receipt as the case may be, received by Buyer (or credited to Buyer against a previously received advance) from a person, firm or corporation from the exploitation by that person, firm or corporation of rights in those Masters, less all "out-of-pocket" costs paid or incurred by Buyer in connection with the exploitation of those rights and the collection of those monies (it being understood that such costs shall not include Buyer's overhead), less all taxes actually paid and adjustments and less all royalties or other sums payable by Buyer to any person, firm or corporation in connection with the exploitation of those rights, except for royalties or other sums payable to producers of those Masters, which shall be borne solely by Seller.

(p) The term "Net Sales" shall mean, subject to the provisions of paragraph 4 (c)(iv) above, one hundred (100%) percent of gross sales of records under this Agreement, computed after calculation of actual returns and adjustments in connection with records hereunder.

(q) The term "Net Sales through Normal Retail Distribution Channels" shall refer to Net Sales of Phonograph Records hereunder through us or our principal distributor in the country in question for resale through record or other retail stores for which a royalty is payable hereunder (and, without limiting the generality of the foregoing, shall exclude sales or distributions referred to in paragraph 4(b) above other than those referred to in subparagraph 4(b)(vii).

(r) The terms "Phonograph Record" and "Record" shall mean every form of reproduction (whether now known or unknown), embodying sound alone, or sound accompanied by visual images,

distributed primarily for home use, school use, juke box use, and use in means of transportation, including, without limitation, discs of any speed or size, reel-to-reel tapes, cartridges, cassettes, or other pre-recorded tapes.

(s) The term "Selection" shall mean a Musical Composition, poem, dramatic work, comedy routine, or other verbal expression.

(t) The term "Single" shall mean either (i) 7-inch disc Phonograph Record, (ii) a so-called cassette single, or (iii) 3-inch compact disc single or New Medium equivalent.

(u) The terms "Suggested Retail List Price" and "SRLP" shall, except as otherwise herein provided, mean:

(i) For records sold in the United States, the manufacturer's suggested retail price in the United States.

(ii) For records sold outside of the United States, the manufacturer's suggested retail price in the country of manufacture or sale, as Buyer is paid or credited. In those countries where a manufacturer's suggested retail price is not utilized or permitted, the generally accepted retail price will be utilized which for purposes hereof shall be deemed to be an amount equal to one hundred thirty (130%) percent of our licensees' or affiliates', as applicable, published price to dealers of each such Phonograph Record (or if no such published price exists, then an amount equal to one hundred thirty [130%] of the actual price charged to dealers for the majority of such Phonograph Records by our licensees or affiliates, as applicable) less value added tax or any other applicable sales tax or similar taxes and/or levies and/or duties which form a recognizable distinct element in the price and which are recovered as part of the selling price to dealers from the inception of production thereof up to and including the ultimate sale thereof to such dealer.

(iii) In computing sales, Buyer will have the right to deduct all actual returns of records hereunder made at any time and for any reasonable reason for which Buyer gives credit.

(v) The term "Territory" shall mean the world.

8. Seller represents, warrants and agrees that:

(i) The Masters were recorded in the United States of America; (ii) payment in full was made for all musicians' services in connection with the Masters; (iii) all other costs

and expenses in connection with the recording of the Masters and the embodiment of the performances thereon were paid; (iv) Seller and Artist agree that Artist shall not perform in any manner any selection or portion thereof recorded and/or delivered hereunder, whether or not released by Buyer, for the purposes of making records for distribution or sale in the Territory by or for any person other than Buyer, at any time prior to five (5) years after the date of delivery to Buyer of the Masters embodying such selection; (v) Danzig solely owns or controls all rights in and to all of the Controlled Compositions and CCLV does not own or control any rights in and to any of the Controlled Compositions; (vi) Each Master shall be free of all liens and encumbrances, and there will be no claims, demands or actions pending or threatened with respect thereto; and, (vii) Neither any name(s) utilized by Artist, the Masters, any of the selections embodied therein, any other matters or materials supplied by Seller hereunder, nor any exploitation or use of any of the foregoing, shall violate or infringe upon any civil, personal or proprietary rights of any person, including, without limitation, trademarks, trade names, copyrights and rights of privacy and publicity.

9. Indemnification. Seller agrees to indemnify and hold Buyer and its parents, affiliates, subsidiaries, divisions, licensees, successors and assigns and its officers, directors and employees and such other entities harmless from and against any liability, damage, cost or expense (including costs and reasonable attorneys' fees) occasioned by or arising out of any claim, demand or action which is inconsistent with any agreement, representation, grant or warranty made or assumed by Seller hereunder which is reduced to final non-appealable judgment or settled with written consent of Danzig or CCLV, which consent shall not be unreasonably withheld; provided, however, that in the event that any such claim results in a final, non-appealable judgment which is not adverse to either Seller or Buyer, then Seller's indemnification shall be limited to one-half (1/2) of the costs and expenses (including reasonable attorneys' fees) incurred by Buyer in connection with such claim. Buyer agrees to give Seller prompt written notice of any claim, demand or action to which the foregoing indemnity applies, and Seller may participate in the defense of same at Seller's expense, through counsel of Seller's choice; provided, that the final control and disposition of same (by settlement, compromise or otherwise) shall remain with Buyer, subject to Seller's right of consent to settlement in accordance with the preceding sentence of this paragraph 9; provided, of course, that Buyer shall only control the disposition thereof as to Buyer (and not as to Seller). Seller agrees to pay Buyer on demand any amounts for which Seller may be responsible under the foregoing indemnity and, without limiting any of Buyer's other rights or remedies, upon the making or filing of any claim demand or action subject hereto, Buyer

shall be entitled to withhold sums payable under this agreement, in an amount reasonably related to the potential liability, plus costs and reasonable attorneys' fees; provided, that Buyer shall not withhold any monies if Seller posts a bond which has been reasonably approved in all aspects (form, amount, duration, surety, etc.) by Buyer, and provided further that Buyer shall liquidate all such sums withheld within twelve (12) months from the date such written claim is made if no action is filed (but if Buyer does release such monies as aforesaid Buyer shall have the right to thereafter withhold monies if an action is thereafter filed with respect to such claim). Seller will, at Buyer's request, cooperate fully with Buyer in any controversy which may arise with third parties or litigation which may be brought by third parties concerning this agreement or any of Buyer's rights hereunder. If Seller fails to consent to a proposed settlement, Buyer shall nonetheless have the right to enter into such proposed settlement, but, in such event, Seller shall not be liable for the amount of the settlement, but shall be liable for expenses (including costs and reasonable attorneys' fees) which Buyer incurred up to and including the date as of which the claim is settled. Alternatively, if Seller fails to consent to a proposed settlement and Buyer elects not to enter into such settlement agreement in accordance with the immediately preceding sentence, Seller shall, at Buyer's written request, thereafter directly bear all costs of defense and shall promptly reimburse Buyer for all expenses incurred by Buyer (including costs and reasonable attorneys' fees) up to and including the date as of which Seller failed to consent to such proposed settlement, and if Seller fails to promptly undertake such future costs and reimburse Buyer for such accumulated expenses, Buyer may settle such claim in Buyer's sole discretion and Seller's indemnification shall apply to such settlement.

10. Assignment. Buyer shall have the right, at Buyer's election, to assign any of Buyer's rights hereunder, in whole or in part, to any subsidiary, affiliated, controlling or other related company and to any person firm or corporation owning or acquiring a substantial portion of Buyer's stock or assets, and any rights so assigned may also be assigned by the assignee, provided that Buyer shall remain secondarily liable for the performance of all of the terms and conditions of this agreement on the Buyer's part to be performed if any assignee of Buyer does not expressly assume Buyer's obligations and duties hereunder. Seller shall not have the right to assign any of Seller's rights hereunder, other than Seller's right to receive income hereunder.

11. Notices. All notices to be given to Seller hereunder and all statements and payments to be sent to Seller hereunder shall be addressed to Seller at the address set forth on page 1 hereof or at such other address as Seller shall designate in

writing from time to time. All notices to be give to Buyer hereunder shall be addressed to Buyer at the address set forth on page 1 hereof or at such other address as Buyer shall designate in writing from time to time. All notices shall be in writing, by registered or certified mail, return receipt requested, and shall either be served by personal delivery (with receipt signed by deliverer), mail, certified or registered return receipt requested, telegraph or telex, all charges prepaid, to the attention of an officer of Buyer's if to Buyer. Except as otherwise provided herein, notices shall be deemed given when personally delivered, mailed, delivered to a telegraph office, or transmitted by telex, all charges prepaid, except that notices of change of address shall be effective only after actual receipt. A copy of all notices to Buyer shall be sent to Fischbach, Perlstein & Yanny, Attention: Bernard J. Fischbach, 1925 Century Park East, Suite 1260, Los Angeles, CA 90067. A courtesy copy of all notices to Danzig shall be sent to Beldock, Levine and Hoffman, 99 Park Avenue, New York, New York 10016, Attention: Peter Matorin, Esq., and a courtesy copy of all notices to CCLV shall be sent to Pryor, Cashman, Sherman and Flynn, 410 Park Avenue, New York, New York 10022, Attention: David Mantel, Esq., provided that an inadvertent failure to send any such notice shall not constitute a breach of this agreement or impair the notice so given.

12. Miscellaneous.

(a) This Contract set forth Seller's and Buyer's entire understanding relating to its subject matter. No modification, amendment, waiver, termination or discharge of this Contract or of any its terms shall be binding upon either party unless confirmed by a document signed by all members of Artist and by a duly authorized officer of Buyer. There are no representations, warranties, terms, conditions, undertakings or collateral agreements, express, implied or statutory, between the parties other than as expressly set forth in this agreement. No waiver by Seller or Buyer of any term of this Contract or of any default hereunder shall affect Seller's or Buyer's respective rights thereafter to enforce that term or to exercise any right or remedy in the event of any other default, whether or not similar.

(b) (i) Buyer shall not be deemed to be in breach of any of Buyer's obligations hereunder unless and until Seller shall have given Buyer specific written notice by certified or registered mail, return receipt requested, describing in detail the breach and Buyer shall have failed to cure that breach within thirty (30) days after Buyer's receipt of that written notice.

(ii) Except as otherwise specified herein, Seller shall not be deemed to be in breach of any of Seller's obligations hereunder unless and until Buyer shall have given Seller specific written notice by certified or registered mail, return receipt requested, describing in detail the breach and Seller shall have failed to cure that breach within thirty (30) days after Seller's receipt of that written notice (it being understood that written notices to Seller under this agreement shall be deemed to have been received within three (3) days after Buyer's mailing thereof in accordance with the provisions of paragraph 11 above).

(c) Wherever the approval or consent of a party is required hereunder, such approval or consent shall not be unreasonably withheld. Either party may require the other to formally give or withhold such approval or consent by giving notice requesting same and by furnishing the other party with the information or material in respect of which such approval or consent is sought. Except where otherwise expressly provided elsewhere in this agreement, the notified party shall give written notice of approval or disapproval or of consent or non-consent within ten (10) business days after such notice is received and in the event of disapproval or non-consent, such notice shall contain the specific reasons therefor. Failure to give notice as aforesaid shall be deemed to be consent or approval, as the case may be, with respect to the matter submitted. For the avoidance of doubt, it is understood that wherever the approval or consent of Seller is required, such approval or consent shall be deemed given if such consent or approval is given by either Danzig or CCLV.

(d) Nothing herein contained shall constitute a partnership or a joint venture between you and us. Except as otherwise expressly provided herein you and the Artist are performing your obligations hereunder as independent contractors. Neither party hereto shall hold itself out contrary to the terms of this subdivision, and neither you nor we shall become liable for any representation, act or omission of the other contrary to the provisions hereof.

(e) This Contract shall not be deemed to give any right or remedy to any third party whatsoever unless that right or remedy is specifically granted by us in writing to that third party.

(f) In the event of any action, suit or proceeding arising from or based upon this Contract brought by either party hereto against the other, the prevailing party shall be entitled to recover from the other its reasonable attorney's fees in

connection therewith in addition to the costs of that action, suit or proceeding.

(g) Except as otherwise expressly provided herein all rights and remedies herein or otherwise shall be cumulative and none of them shall be in limitation of any other right or remedy.

(h) This Contract has been entered into in the State of New York, and its validity, construction, interpretation and legal effect shall be governed by the laws of the State of New York applicable to contracts entered into and performed entirely within the State of New York. Any claim, dispute or disagreement in respect of this Contract may be brought only in the courts of the State of New York or the federal courts within the State of New York, which courts shall have exclusive jurisdiction thereof, and Seller and Artist hereby waive any claim that such courts do not have jurisdiction or are an inconvenient forum. Any process in any action or proceeding commenced in any court may, among other methods, be served upon Seller (and/or Artist) or Buyer, as applicable, by delivering or mailing the same, via registered or certified mail, addressed to Seller (and/or Artist) or Buyer, as applicable, at the address set forth in paragraph 11 hereof. Any such delivery or mail service shall be deemed to have the same force and effect as personal service within the State of New York.

(i) This Contract may be executed in counterparts. This Contract shall not become effective until signed by you and countersigned by a duly authorized officer of ours.

(j) The paragraph headings herein are solely for the purpose of convenience and shall be disregarded completely in the interpretation of this Contract or any of its terms.

(k) This Contract shall not become effective until the Settlement and Release Agreement has been executed by the parties hereto.

13. This agreement constitutes the entire agreement among the parties pertaining to the subject matter contained in it and supersedes all prior agreements, representations and understandings of the parties, including, but not limited to those various agreements previously entered into between Buyer and Danzig with respect to the Masters. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by all the parties. No waiver of any of the provisions of this agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No

waiver shall be binding unless executed in writing by the party making the waiver.

14. Marketing Restrictions. Notwithstanding any provision contained herein to the contrary:

(a) Buyer shall consult with Danzig or CCLV in connection with the commercial release of any so-called multiple album in the United States; provided, however, that Buyer's inadvertent failure to so consult with Danzig or CCLV shall not constitute a breach of this agreement.

(b) Buyer shall not distribute copies of any album which has not been previously released by Buyer, as a mid-price record in the United States prior to the date which is twelve (12) months after the initial United States release of any such previously unreleased album unless Buyer shall pay Seller royalties with respect to any such copies distributed prior to the expiration of such twelve (12) month period at the rate set forth in paragraph 4(a)(i) above without reduction in such rate pursuant to paragraph 4(b)(iii) above.

(c) Buyer shall not distribute copies of any album which has not been previously released by Buyer, as a budget record in the United States prior to the date which is eighteen (18) months after the initial United States release of any such previously unreleased album unless Buyer shall pay Seller royalties with respect to any such copies distributed prior to the expiration of such eighteen (18) month period at the rate set forth in paragraph 4(a)(i) above without reduction in such rate pursuant to paragraph 4(b)(iii) above.

(d) Buyer shall not authorize the use in the United States of any Master hereunder for any commercial advertising a product other than records hereunder) or a film rated NC-17 without Danzig's or CCLV's written consent, which consent shall not be unreasonably withheld.

(e) Buyer shall consult with Danzig or CCLV with respect to the coupling of Masters hereunder on any particular record embodying Master Recordings featuring artists other than the Artist for release in the United States; provided, however, that Buyer's inadvertent failure to so consult with Danzig or CCLV shall not constitute a breach of this agreement.

15. Editing. Notwithstanding any provision contained herein to the contrary, Buyer shall not have the right to edit, resequence or remix the Masters hereunder without the written approval of Danzig's or CCLV (which approval shall not be unreasonably withheld and for purposes of clarification it is

understood that Buyer shall not have to obtain the approval of both Danzig and CCLV, but only one of Danzig or CCLV) except as to non-disc configurations and Cds, and then solely for timing purposes throughout the Territory. In respect of United States singles, if a representative of Danzig's or CCLV's is specifically designated in writing for this purpose is available in New York, New York, such representative shall have the right to remix or cut Masters for singles (if necessary), and if such individual fails to do so within ten (10) days after receipt of Buyer's request, Buyer may edit, remix or cut such Masters as Buyer deem appropriate (subject to such individual's approval, which approval shall be deemed given if written objection is not given to Buyer within five (5) days after receipt of the item, stating the basis of the objection). If such individual edits, remixes or cuts for a single and Buyer does not approve such editing, remixing or cutting, Buyer may re-edit, remix or re-cut same (subject to such individual's approval, which approval shall be deemed given if written objection is not given to Buyer within five (5) business days after receipt of the item, stating the basis of the objection) or re-submit same to Danzig's or CCLV's representative for re-editing, remixing or re-cutting in accordance with the above ten (10) day procedure. The individual producer of the applicable Master is hereby designated for purposes of this paragraph 15 until further notice to Buyer, as the person authorized, on Seller's behalf, to edit, remix or cut Masters for singles in accordance with the procedure set forth herein.

16. Slash LP:

(a) If (i) the rights in and to the master recordings embodied on the album entitled "Walk Among Us" embodying the performances of Artist and previously released on the Slash Records label (hereinafter referred to as "Slash LP") or any other master recording embodying the performances of the Artist which revert to Seller or are acquired by Seller (hereinafter referred to as the "Other Masters", it being understood however, that all master recordings embodying the performances of Artist, which are presently owned or controlled by Seller, other than the Slash LP are being transferred to Buyer hereunder) and (ii) Seller shall desire to sell, transfer, assign or otherwise dispose of or exploit the Slash LP or the Other Masters, before negotiating with any third party, Seller shall first give Buyer written notice of Seller's desire to dispose of Seller's interest or to exploit the Slash LP or the Other Masters and shall engage in prompt continuous good faith negotiations with Buyer concerning the terms of the sale. If the parties are unable to reach an agreement on the material terms of such sale within sixty (60) days after Seller's notice to Buyer, Seller may elect to discontinue the negotiations by written notice to Buyer.

Thereafter, Seller may solicit offers to dispose of its interest in or to exploit the Slash LP or the Other Masters, subject to the provisions of subparagraph 16(b) below.

(b) If Seller shall receive a bona fide offer in accordance with the provisions of subparagraph 16(a) above, to acquire any interest in or to exploit the Slash LP or the Other Masters, which offer is acceptable to Seller, before accepting any such offer, Seller shall first offer to Buyer the right to buy or acquire such interest or the right to exploit the Slash LP or the Other Masters at the same bona fide price and pursuant to the same bona fide terms as may be offered to Seller by said third party. Seller agrees to give Buyer written notice of any such bona fide and acceptable offer as described above (which notice shall set forth the name of the prospective purchaser, the price, and all other terms of such offer), and Buyer shall have five (5) business days after receipt of such notice in which to notify Seller whether or not it desires to acquire such interest or to exploit the Slash LP or the Other Masters at the price and pursuant to the terms set forth in said notice. In the event Buyer fails to give Seller written notice within said five (5) business day period that it is exercising its option to buy or acquire such interest or the right to exploit the Slash LP or the Other Masters, Seller shall have the right to accept the bona fide offer by the prospective purchaser, but only as set forth in Seller's notice to Buyer, provided, however that if Seller does not accept such bona fide offer from such prospective purchaser within sixty (60) days after expiration of said five (5) business day period, the procedure set forth in this paragraph shall again be followed by Seller before Seller may dispose of such interest or the right to exploit the Slash LP or the Other Masters to such third party.

17. First Right of Refusal on Concert Video. Seller hereby grants to Buyer the right of first refusal with respect to acquiring the rights in and to the long form video of Artist's concert in Boston (the "Concert Video"). Seller shall notify Buyer in writing promptly after Seller elects to enter into an agreement with respect to the Concert Video. Upon Seller's notification to Buyer that Seller desires to enter into an agreement with respect to the Concert Video, Seller and Buyer shall then negotiate in good faith regarding the terms and conditions of an agreement for Buyer's acquisition of the Concert Video. If Seller and Buyer are not able to conclude an agreement within thirty (30) days after Seller has notified Buyer of Seller's desire to enter into such agreement for the Concert Video, then Seller shall have the right to commence negotiations with any other third party for the right to enter into an agreement with Seller with respect to the Concert Video. If Seller receives a bona fide offer from a third party ("Third

Party Offer") to acquire the Concert Video, and such Third Party Offer is the same as or not as good as the offer Buyer had previously made to Seller or encompasses more or less rights than Seller originally offered to Buyer, then Seller agrees to first offer in writing to Seller the first right to acquire the Concert Video on the same terms and conditions as offered to Seller by such Third Party Offer. Seller shall convey such offer to Buyer in writing, detailing the terms and conditions of such Third Party Offer, and Buyer shall have ten (10) days following its receipt of such Third Party Offer to notify Seller in writing whether it accepts or rejects such offer. Buyer's failure to so notify Seller shall be deemed its rejection of such offer. It is understood that Buyer shall not be required, as a condition of accepting such Third Party Offer, to agree to any terms or conditions which cannot be fulfilled by Buyer as readily as by any other person.

18. Sam Hain Catalogue/Glenn Danzig "Black Aria"

(a) If (i) the rights in and to the master recordings embodied on the albums known as the "Sam Hain Catalogue" (hereinafter referred to as the "Hain Catalogue") and the rights in and to the master recordings embodied on the albums known as "Glenn Danzig Black Aria" (hereinafter referred to as "Black Aria Albums") revert, respectively, to Danzig and (ii) Danzig shall desire to sell, transfer, assign or otherwise dispose of or exploit the Hain Catalogue and the Black Aria Albums, respectively, before negotiating with any third party, Danzig shall first give Buyer written notice of Danzig's desire to dispose of Danzig's interest or to exploit the Hain Catalogue and the Black Aria Albums, respectively, and shall engage in prompt continuous good faith negotiations with Buyer concerning the terms of the sale. If the parties are unable to reach an agreement on the material terms of such sale within sixty (60) days after Danzig's notice to Buyer, Danzig may elect to discontinue the negotiations by written notice to Buyer. Thereafter, Danzig may solicit offers to dispose of its interest in or to exploit the Hain Catalogue and the Black Aria Albums, respectively, subject to the provisions of subparagraph 18(b) below.

(b) If Danzig shall receive a bona fide offer in accordance with the provisions of subparagraph 18(a) above, to acquire any interest in or to exploit the Hain Catalogue and the Black Aria Albums, respectively, which offer is acceptable to Danzig, before accepting any such offer, Danzig shall first offer to Buyer the right to buy or acquire such interest or the right to exploit the Hain Catalogue and the Black Aria Albums, respectively, at the same bona fide price and pursuant to the same bona fide terms as may be offered to Danzig by said third

party. Danzig agrees to give Buyer written notice of any such bona fide and acceptable offer as described above (which notice shall set forth the name of the prospective purchaser, the price, and all other terms of such offer), and Buyer shall have five (5) business days after receipt of such notice in which to notify Danzig whether or not it desires to acquire such interest or to exploit the Hain Catalogue and the Black Aria Albums, respectively, at the price and pursuant to the terms set forth in said notice. In the event Buyer fails to give Danzig written notice within said five (5) business day period that it is exercising its option to buy or acquire such interest or the right to exploit the Hain Catalogue and the Black Aria Albums, respectively, Danzig shall have the right to accept the bona fide offer by the prospective purchaser, but only as set forth in Danzig's notice to Buyer, provided, however that if Danzig does not accept such bona fide offer from such prospective purchaser within sixty (60) days after expiration of said five (5) business day period, the procedure set forth in this paragraph shall again be followed by Danzig before Danzig may dispose of such interest or the right to exploit the Hain Catalogue and the Black Aria Albums, respectively, to such third party.

19. Buyer agrees to furnish to each member of Artist free of cost fifteen (15) units of each previously unreleased album in any one (1) configuration specified by Seller.

IN WITNESS WHEREOF, the parties to this agreement have duly executed it on the date herein first above written.

CAROLINE RECORDS, INC.

GLENN DANZIG p/k/a
"DANZIG" d/b/a PLAN 9
RECORDS

By: _____

GERALD CAIAFA

PAUL CAIAFA

FRANK LICATA

JULIO VALVERDE

SCHEDULE A

12/12/94
rhl/vra/misfits.4

ASSIGNMENT OF COPYRIGHT

DATED: January 1, 1995

ASSIGNOR(S):

ASSIGNEE(S): Caroline Records, Inc.
114 West 26th Street
New York, New York 10001

For good and valuable consideration, the receipt of which is hereby acknowledged, Assignor hereby assigns, transfers, sets over and conveys to Assignee and its successors and assigns all of Assignor's right, title and interest in and to one hundred (100%) percent of the master recording entitled:

TITLE: _____

ARTIST: _____

REGISTRATION & DATE: _____

and all versions thereof, including the sound recording copyright therein and any renewals and extensions thereof, and all proprietary rights therein now known or hereafter created throughout the world, and, further, including any and all claims, demands and causes of action, for infringement or otherwise, of the same, from and after the date hereof and all of the proceeds from the foregoing hereafter accruing, all subject to the terms of the agreement dated as of January 1, 1995 between Assignor and Assignee.

IN WITNESS WHEREOF, the undersigned has executed this Assignment as of the date above written.

By: _____

ASSIGNMENT OF COPYRIGHT

DATED: January 1, 1995

ASSIGNOR(S):

ASSIGNEE(S): Caroline Records, Inc.
114 West 26th Street
New York, New York 10001

For good and valuable consideration, the receipt of which is hereby acknowledged, Assignor hereby assigns, transfers, sets over and conveys to Assignee and its successors and assigns all of Assignor's right, title and interest in and to one hundred (100%) percent of the master recording entitled:

TITLE: _____

ARTIST: _____

REGISTRATION & DATE: _____

and all versions thereof, including the sound recording copyright therein and any renewals and extensions thereof, and all proprietary rights therein now known or hereafter created throughout the world, and, further, including any and all claims, demands and causes of action, for infringement or otherwise, of the same, from and after the date hereof and all of the proceeds from the foregoing hereafter accruing, all subject to the terms of the agreement dated as of January 1, 1995 between Assignor and Assignee.

IN WITNESS WHEREOF, the undersigned has executed this Assignment as of the date above written.

1/95

By: 

ASSIGNMENT OF COPYRIGHT

DATED: January 1, 1995

ASSIGNOR(S):

ASSIGNEE(S): Caroline Records, Inc.
114 West 26th Street
New York, New York 10001

For good and valuable consideration, the receipt of which is hereby acknowledged, Assignor hereby assigns, transfers, sets over and conveys to Assignee and its successors and assigns all of Assignor's right, title and interest in and to one hundred (100%) percent of the master recording entitled:

TITLE: _____

ARTIST: _____

REGISTRATION & DATE: _____

and all versions thereof, including the sound recording copyright therein and any renewals and extensions thereof, and all proprietary rights therein now known or hereafter created throughout the world, and, further, including any and all claims, demands and causes of action, for infringement or otherwise, of the same, from and after the date hereof and all of the proceeds from the foregoing hereafter accruing, all subject to the terms of the agreement dated as of January 1, 1995 between Assignor and Assignee.

IN WITNESS WHEREOF, the undersigned has executed this Assignment as of the date above written.

1/95

By: Julian V. Gable

EXHIBIT 2

MISFITS™

POSTER INSIDE!

BLACKLIGHT

THE HUNGER

AMERICAN PSYCHO

MARS ATTACKS

CRIMSON GHOST

DON'T OPEN 'TIL DOOMSDAY

AND MORE!!

The Misfits would like to thank all who have supported us over the years, not to leave anyone out, since there are so many, the Misfits want to say without the help of family, friends and fiends this vision of music would not have materialized. Because of their efforts these images and sounds of horror will live forever!

Tony-a-Tommy at Gothic Guitars, Baltimore, MD
Phil Keller at Victors House of Music, Ridgewood, NJ
Vocal instruction for the Misfits, Don Lawrence, N.Y.C.

Doyle strings guitars with Dean Markley. Doyle dedicates his performance to Louis J. Ricci, he will be missed eternally!

Produced by Daniel Rey
A&R: Michael Alago
Tracked at Dreamland Recording Studio
Engineered by Andy Baker
Assistant Engineer: Sue Kappa

Overdubs at Spa Recording Studio
Engineered by Hillary Johnson
Assistant Engineer: Grace Falconer

Additional Recording at Baby Monster Studio
Engineered by John Smith

Mixed by Andy Wallace
Assistant Engineer: Steve Sisco
Mixed at Sound Tracks N.Y.C.

Mastered at Masterdisk
Mastered by Howie Weinberg

Cover and Poster Painting: Basil Gogos
Photos: Frank White
Additional Photo: Sal Bee & Chris Kerwin
Art Direction: Chris Kerwin & Jerry Only

All songs written by the Misfits
Except Hell Night written by Rey/Misfits
©1997 Cyclonian Music Inc. BMI
Lyrics Reprinted by Permission.
All Rights Reserved.

Misfits Manager: Ken Caiata
The Official Misfits Fiend Club:
P.O. Box 310, Vernon, N.J. 07462

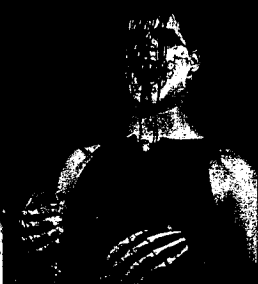
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GEFD-25126



GEFFEN®



DOYLE
WOLFGANG VON FRANKENSTEIN
GUITAR



MICHAEL GRAVES
VOCALS



DR. CHUP
DRUMS



JERRY ONLY
BASS

1 ABOMINABLE
DR. PHIBES

2 AMERICAN PSYCHO

3 SPEAK OF THE DEVIL

4 WALK AMONG US

5 THE HUNGER

6 FROM HELL
THEY CAME

7 DIG UP HER BONES

8 BLACKLIGHT

9 RESURRECTION

10 THIS ISLAND EARTH

11 CRIMSON GHOST

12 DAY OF THE DEAD

13 THE HAUNTING

14 MARS ATTACKS

15 HATE THE LIVING,
LOVE THE DEAD

16 SHINING

17 DON'T OPEN 'TIL DOOMSDAY

Produced by Daniel Rey
Engineered by Andy Wallace
Mixed by Michael Alago



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AMERICAN PSYCHO

1 ABOMINABLE DR. PHIBES

2 AMERICAN PSYCHO

3 SPEAK OF THE DEVIL

4 THIS ISLAND EARTH

5 RESURRECTION

6 BACKLIGHT

7 WALK AMONG US

8 FROM THE DEEP

9 CRIMSON GHOS

10 DAY OF THE DEAD

11 THE HAUNTING

12 MARS ATTACKS

13 HATE THE LIVING, LOVE THE DEAD

14 DON'T OPEN THE DOOR

15 SHINING

MISFITS

AMERICAN PSYCHO

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GLENN DANZIG,

Petitioner,

vs.

CYCLOPIAN MUSIC, INC.,

Registrant.

)
)
)
)
) Cancellation No. 92045173

)
) Reg. Nos. 2793533, 2634215, 2735848
)
)
)

Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 22313-1451

**REGISTRANT CYCLOPIAN MUSIC INC.'S RULE 56(f)
MOTION IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO PETITIONER'S
MOTION FOR SUMMARY JUDGMENT**

Registrant Cyclopien Music Inc. ("Cyclopien") respectfully requests that, to the extent the Board does not deny Petitioner Glenn Danzig's Motion for Summary Judgment (the "Motion") for the reasons set forth in Sections III.A through III.C of Cyclopien's Response in Opposition to Petitioner's Motion for Summary Judgment (the "Response") filed concurrently herewith, the Board otherwise deny Petitioner's Motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure and Trademark Trial and Appeal Board Manual of Procedure § 528 because Cyclopien requires discovery essential to prove its affirmative defenses in this proceeding, as set forth in Section III.D of Cyclopien's Response and the Declaration of Curtis B. Krasik, filed concurrently herewith and incorporated herein.

Express Mail® Mailing Label Number 990156034

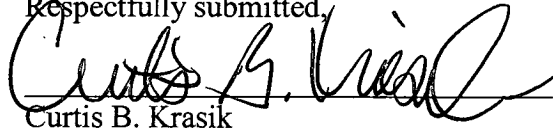
Date of Deposit October 27, 2006

I certify that this paper or fee is being deposited with the United States Postal Service
"Express Mail Post Office to Addressee" service under 37 CFR § 2.198 on the date indicated below
and is addressed to United States Patent and Trademark Office, Attn: Trademark Trial and Appeal Board, P.O. Box
1451, Alexandria, VA 22313-1451

Karen Tyree

October 27, 2006

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Curtis B. Krasik", written over a horizontal line.

Curtis B. Krasik

Christopher M. Verdini

KIRKPATRICK & LOCKHART NICHOLSON

GRAHAM LLP

Henry W. Oliver Building

535 Smithfield Street

Pittsburgh, PA 15222

(412) 355-6500 (Telephone)

(412) 355-6501 (Facsimile)

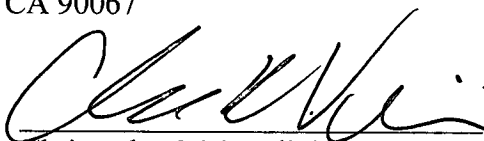
Attorneys for Registrant

Cycloplan Music, Inc.

Certificate of Service

I certify that a copy of the foregoing Registrant Cycloplan Music, Inc.'s Rule 56(f)
Motion In Support Of Its Opposition In Response To Petitioner's Motion for Summary Judgment
was served by U.S. first-class mail on October 27, 2006, on the following counsel of record for
Petitioner Glenn Danzig:

Rod S. Berman
Jeffer, Mangels, Butler & Marmaro, LLP
1900 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067


Christopher M. Verdini

1451, Alexandria, VA 22313-1451

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GLENN DANZIG,

Petitioner,

vs.

CYCLOPIAN MUSIC, INC.,

Registrant.

)
)
)
)
) Cancellation No. 92045173
)
) Reg. Nos. 2793533, 2634215, 2735848
)
)
)

Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

DECLARATION OF CURTIS B. KRASIK

I, Curtis B. Krasik declare as follows:

1. I am an attorney licensed to practice in the Commonwealth of Pennsylvania. I am a partner with Kirkpatrick & Lockhart Nicholson Graham, LLP, counsel of record for Cyclopiian Music, Inc. ("Cyclopiian"). I am over eighteen (18) years of age, have personal knowledge of the matters set forth herein and am competent to testify thereto.

2. Attached hereto as Exhibit 1 is a true and correct copy of a printout from the USPTO's Trademark Electronic Search System evidencing Petitioner's abandonment of application Serial No. 74/300,499 for MISFITS in Class 16.

3. Attached hereto as Exhibit 2 is a true and correct copy of relevant excerpts from the discovery deposition taken on September 21, 2006 of Felix Sebacious, senior vice president of A&R of Bravado International Group, Inc. ("Bravado"), successor-in-interest to Blue Grape Merchandising ("Blue Grape"), and previously senior executive of Blue Grape.

4. Attached hereto as Exhibit 3 is a true and correct copy of the subpoena served by Cycloplan on Bravado, as successor-in-interest to Blue Grape, in connection with this proceeding.

5. Attached hereto as Exhibit 4 are relevant documents produced by Bravado, as successor-in-interest to Blue Grape, in response to the subpoena attached at Exhibit 3.

6. Attached hereto as Exhibit 5 is a true and correct copy of Petitioner's Responses to Cycloplan's First Set of Interrogatories.

7. To the extent the Board does not deny Petitioner's Motion for Summary Judgment (the "Motion") for the reasons set forth in Sections III.A through III.C of Cycloplan's Response in Opposition to Petitioner's Motion for Summary Judgment (the "Response") filed concurrently herewith, Rule 56(f) of the Federal Rules of Civil Procedure otherwise precludes summary judgment because Cycloplan requires discovery essential to prove its affirmative defenses in this action.

8. As described in Cycloplan's Response, Petitioner filed his Motion prior to the close of discovery and just days before Petitioner's deposition was scheduled to occur, which had been noticed for over one month. As a result of such tactical gamesmanship, Cycloplan was thwarted from conducting necessary discovery on its potentially case-dispositive affirmative defenses, including, but not limited to, laches, acquiescence, waiver, estoppel and unclean hands. These issues uniquely involve facts and circumstances within Petitioner's knowledge and possession.

9. While not intended to be an exhaustive list, the following reflects discovery Cycloplan presently believes is necessary in support of its affirmative defenses, which Cycloplan

believes would be successful in defeating Petitioner's claims in this proceeding, including those claims on which Petitioner seeks summary judgment:

- (a) All facts and circumstances concerning when Petitioner became aware of Cyclopiant's use of the MISFITS Marks (as defined in Cyclopiant's Response) that Petitioner contends is inconsistent with his purported rights in the MISFITS Marks under the Settlement Agreement.
- (b) All facts and circumstances concerning when Petitioner became aware of Cyclopiant's registration of the MISFITS Marks that Petitioner contends is inconsistent with his purported rights in the MISFITS Marks under the Settlement Agreement.
- (c) All facts and circumstances concerning when Petitioner became aware of Cyclopiant's assertion of rights in the MISFITS Marks that Petitioner contends is inconsistent with his purported rights in the MISFITS Marks under the Settlement Agreement.
- (d) All facts and circumstances concerning actions Petitioner took after becoming aware of Cyclopiant's use of the MISFITS Marks that Petitioner contends is inconsistent with his purported rights in the MISFITS Marks under the Settlement Agreement.
- (e) All facts and circumstances concerning actions Petitioner took after becoming aware of Cyclopiant's registration of the MISFITS Marks that Petitioner contends is inconsistent with his purported rights in the MISFITS Marks under the Settlement Agreement.

- (f) All facts and circumstances concerning actions Petitioner took after becoming aware of Cycloplan's assertion of rights in the MISFITS Marks that Petitioner contends is inconsistent with his purported rights in the MISFITS Marks under the Settlement Agreement.
- (g) All facts and circumstances related to and/or underlying Petitioner's vague and unsubstantiated response to Cycloplan's interrogatory request regarding Petitioner's knowledge of Cycloplan's application for and registration of the MISFITS Marks.
- (h) All facts and circumstances concerning Petitioner's assertion of rights in the MISFITS Marks inconsistent with Registrant's rights in the MISFITS Marks.

11. Cycloplan intends to depose Petitioner on at least the foregoing subjects. Such discovery is necessary to enable Cycloplan to pursue its affirmative defenses, including, but not limited to, laches, acquiescence, waiver, estoppel and unclean hands, which would provide a complete bar to Petitioner's claims in this proceeding, including those claims on which Petitioner seeks summary judgment.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed in Pittsburgh, Pennsylvania on October 27, 2006.

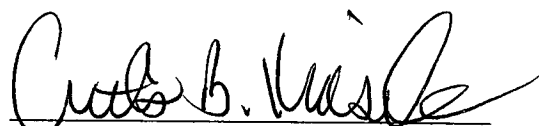

Curtis B. Krasik

EXHIBIT 1

**United States Patent and Trademark Office**[Home](#) | [Site Index](#) | [Search](#) | [FAQ](#) | [Glossary](#) | [Guides](#) | [Contacts](#) | [eBusiness](#) | [eBiz alerts](#) | [News](#) | [Help](#)**Trademarks > Trademark Electronic Search System(Tess)**

TESS was last updated on Tue Oct 24 04:19:23 EDT 2006

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Word Mark MISFITS
Goods and Services (ABANDONED) IC 016. US 038. G & S: comic books, and newspaper comic strips
Mark Drawing Code (1) TYPED DRAWING
Design Search Code
Serial Number 74300499
Filing Date August 3, 1992
Current Filing Basis 1B
Original Filing Basis 1B
Published for Opposition June 22, 1993
Owner (APPLICANT) Danzig, Glenn INDIVIDUAL UNITED STATES c/o Direct Management Group 947 N. La Cienega Suite G Los Angeles CALIFORNIA 90069
Attorney of Record Eric E. Brown
Type of Mark TRADEMARK
Register PRINCIPAL
Live/Dead Indicator DEAD
Abandonment Date September 15, 1994

[TESS HOME](#) [NEW USER](#) [STRUCTURED](#) [FREE FORM](#) [BROWSE DICT](#) [SEARCH OG](#) [TOP](#) [HELP](#)[HOME](#) | [SITE INDEX](#) | [SEARCH](#) | [eBUSINESS](#) | [HELP](#) | [PRIVACY POLICY](#)

EXHIBIT 2

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

----- X
GLENN DANZIG,)
)
Petitioner,)
)
)
-against-)
) Cancellation No.
) 92045173
CYCLOPIAN MUSIC, INC.,)
)
Registrant.)
----- X

DEPOSITION OF FELIX SEBACIOUS
New York, New York
September 21, 2006

Reported by:
Judi Johnson, RPR, CLR
Job No.: 8684

599 Lexington Avenue
New York, New York

September 21, 2006
10:00 A.M.

Deposition of FELIX SEBACIOUS,
held at the offices of KILPATRICK &
LOCKHART NICHOLSON GRAHAM, LLP, 599
Lexington Avenue, New York, New
York, pursuant to Notice, before
Judi Johnson, a Registered
Professional Reporter, a Certified
LiveNote Reporter and Notary Public
of the State of New York.

FELIX SEBACIOUS

APPEARANCES:

JEFFER, MANGELS, BUTLER & MARMARO, LLP
Attorney for the Petitioner
1900 Avenue of the Stars - 7th Floor
Los Angeles, California 90067
BY: (NOT PRESENT), ESQ.

KILPATRICK & LOCKHART NICHOLSON GRAHAM, LLP
Attorney for the Registrant
Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, Pennsylvania 15222-2312

BY: CURTIS B. KRASIK, ESQ.

BRAVADO INTERNATIONAL GROUP
Attorney for the Witness
330 Seventh Avenue - 2nd Floor
New York, New York 10001
BY: ERIC J. BENDER, ESQ.

FELIX SEBACIOUS

IT IS HEREBY STIPULATED AND
AGREED by and between the attorneys
for the respective parties herein,
that filing and sealing and the same
are hereby waived.

IT IS FURTHER STIPULATED AND
AGREED that all objections, except
as to the form of the question,
shall be reserved to the time of the
trial.

IT IS FURTHER STIPULATED AND
AGREED that the within deposition
may be sworn to and signed before
any officer authorized to administer
an oath, with the same force and
effect as if signed and sworn to
before the Court.

- o0o -

FELIX SEBACIOUS

FELIX SEBACIOUS,
Called as a witness herein,
having first been duly sworn, was
examined and testified as follows:

BY THE REPORTER:

**Q Please state your name and address
for the record.**

A Felix Sebacious, 120 Greenwich
Street, Apartment 6C, New York, New York
10006.

EXAMINATION

BY MR. KRASIK:

**Q Good morning, Mr. Sebacious. My
name is Curt Krasik and I'm the attorney
for Cycloplan Music, Inc., which, as you
know, does business as the rock group The
Misfits.**

Have you ever been deposed before?

A Yes, I have.

**Q So you know how this works. I'll be
asking you questions, and the only request
I have is that you respond verbally so
that the court reporter can take down your
answer.**

1 FELIX SEBACIOUS

2 Glenn Davis. But I do believe that it was
3 a different attorney in 1999.

4 **Q Thanks. I believe you testified**
5 **that your first discussions with Danzig**
6 **were in 1998; is that right?**

7 A Correct.

8 **Q At that time, did he have another**
9 **licensing deal with a different company?**

10 A I don't recall the specifics. It's
11 purely conjecture. But I believe his
12 prior deal had expired. He had a deal
13 with a company called Brockham that was no
14 longer in business in 1998. I believe he
15 had deals with other of our competitors, I
16 believe a company called Giant, and that
17 might have been the company he was with
18 prior to Blue Grape.

19 **Q You're familiar with a company**
20 **formerly known as Brockham?**

21 A Yes, I am.

22 **Q And do you know when they went out**
23 **of business?**

24 A I believe Brockham went out of
25 business in 1994. I don't know if he was

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1 FELIX SEBACIOUS

2 still signed to Brockham at that point.

3 **Q I should have asked you a couple of**
4 **background questions.**

5 **How long have you been in the A and**
6 **R merchandising business?**

7 A Since January of 1993.

8 **Q And with whom or for whom did you**
9 **work at that time, in 1993?**

10 A That's when I started working with
11 Blue Grape.

12 **Q So you were with Blue Grape from '93**
13 **until the acquisition in 2004?**

14 A Correct.

15 **Q Would it be safe to say you went**
16 **through a variety of different positions**
17 **and functions at Blue Grape?**

18 A Essentially, yes. I was brought in
19 to run the company when it was quite small
20 in '93. So I essentially ran the company
21 the entire time, although with different
22 titles.

23 **Q At the time of the acquisition, was**
24 **it a bigger company?**

25 A Yes.

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1 FELIX SEBACIOUS

2 **Q So you grew the company?**

3 A That is correct.

4 **Q And in your capacities with Blue**
5 **Grape, did you have occasion to know the**
6 **merchandising market and who your**
7 **competitors were and generally what was**
8 **going on in the industry?**

9 A That is correct.

10 **Q When you entered into discussions**
11 **with Danzig in '98, I guess for the first**
12 **time, what were the licensed properties**
13 **that were being discussed? What did you**
14 **want from him?**

15 A Danzig license for the Danzig name.
16 And the discussions were fairly brief.
17 And I will say for the record that I found
18 him a bit difficult to deal with, and he
19 explained that he wasn't interested at the
20 time.

21 **Q Now when you say the Danzig name,**
22 **are you referring to his individual or his**
23 **project known as the band known as Danzig?**

24 A The band known as Danzig.

25 **Q Were you aware that he was also part**

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1 FELIX SEBACIOUS

2 **of the band known as Sam Hain?**

3 A Yes, I was.

4 **Q Were you interested in licensing the**
5 **properties relating to Sam Hain?**

6 A When I had the initial discussions,
7 I did not discuss Sam Hain with him
8 because, as I stated, it was a very brief
9 conversation related to the band Danzig.

10 **Q When you had this brief discussion**
11 **in 1998, you did not discuss The Misfits**
12 **with Danzig?**

13 A That is correct.

14 **Q Were you aware when you**
15 **approached -- did you approach Danzig or**
16 **did he approach you in '98?**

17 A I approached Danzig.

18 **Q When you approached Danzig in '98,**
19 **were you aware of any rights he might have**
20 **to the Misfits?**

21 A I was not.

22 **Q Let's jump ahead a year to 1999.**
23 **Can you describe for me the genesis and**
24 **generally the development of the**
25 **discussions with Danzig in '99?**

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FELIX SEBACIOUS

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2 A I had an employee by the name of
3 Patrick Mahoney, who I sent to meet with
4 Glenn Danzig in Los Angeles. And Patrick
5 came back and said it was a very positive
6 discussion and that, in addition to the
7 rights to the name Danzig, Danzig the
8 band, the rights for Sam Hain and the
9 rights to the Misfits would also be
10 available. The rights to Danzig on an
11 exclusive basis, the rights to Sam Hain I
12 believe on an exclusive basis and the
13 rights to the Misfits on a nonexclusive
14 basis.
15 Q Patrick Mahoney was your employee's
16 name?
17 A Yes.
18 Q Did Mr. Mahoney describe to you what
19 had changed in Mr. Danzig's view from 1998
20 to 1999 in terms of willingness to grant
21 these licensing rights?
22 A Mr. Mahoney did explain it. I
23 believe -- and I am speculating, but I
24 believe Mr. Mahoney was speculating at the
25 time because he had attributed the change

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FELIX SEBACIOUS

1
2 to Mr. Danzig's willingness to work with
3 Mr. Mahoney personally as the account
4 representative for Danzig.
5 Q I can understand why that would be
6 Mr. Mahoney's recollection.
7 A Yes, that was Mr. Mahoney's
8 recollection. As Mr. Mahoney's boss, it
9 did not matter to me why.
10 Q After this initial discussion with
11 Danzig through Mr. Mahoney, did you come
12 to have discussions with Danzig directly
13 in '99?
14 A Yes, I did.
15 Q Did he explain to you any difference
16 or any reason for his change in
17 willingness to license these rights?
18 A Mr. Danzig's explanation echoed
19 Mr. Mahoney's explanation. Mr. Danzig
20 stated that he wanted to make sure that he
21 had a dedicated account representative
22 that he could call 24 hours a day if there
23 were any problems with the merchandise and
24 felt very comfortable with Mr. Mahoney in
25 that role.

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FELIX SEBACIOUS

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2 Q During the course of your
3 discussions with Danzig in 1999, what did
4 he describe his rights with respect to the
5 Misfits to be?
6 A Mr. Danzig explained that he had
7 nonexclusive rights to use all of the
8 older Misfits designs as they were
9 described to me, which were designs
10 created during the period of time that
11 both he and Jerry were in the band
12 together. He also explained that he would
13 have the ability to create exclusive --
14 new exclusive Misfits designs.
15 Q In addition to designs, did he say
16 anything with respect to the name Misfits
17 itself?
18 A Specifically, he didn't say anything
19 about the name Misfits itself, other than
20 the fact that we could use the name and
21 logo on any of the merchandise.
22 Q He said you could use the name
23 Misfits and the logo of the Misfits?
24 A Yes, that is correct.
25 Q And have you generally heard that

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FELIX SEBACIOUS

1
2 logo referred to as the horror font logo?
3 A No, I have not.
4 Q Do you know what I'm referring to
5 when I say the horror font logo?
6 A I believe from having done many
7 horror films and done merchandise for them
8 for many years, you're referring to a
9 specific type of font that's used in many
10 horror films that is similar to the font
11 used on the Misfits logo. Would that be a
12 correct assumption?
13 Q Yes. That was the purpose of my
14 question.
15 A Yes.
16 Q Are you familiar with more than one
17 logo used by the Misfits?
18 A No, I'm not.
19 Q In the course of these discussions
20 with Mr. Danzig in 1999, did he
21 specifically discuss with you a settlement
22 agreement between he and Jerry Only and
23 other members of the Misfits?
24 A Yes, he did.
25 Q And what, to the best of your

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1 **FELIX SEBACIOUS**

2 **recollection, did he say about that**
3 **settlement?**

4 A As normal procedure, when we're
5 granted rights and especially rights on a
6 nonexclusive basis, part of my job is to
7 inquire as to the availability of those
8 rights. What I was -- what Mr. Danzig
9 explained, that both he and Jerry had
10 nonexclusive rights to use the older
11 designs and as part of a settlement
12 agreement -- I don't recall him telling me
13 the year of it, but I believe I'd seen it
14 since, I believe, 1994. And that any new
15 designs that he created for the Misfits,
16 as long as it didn't have the image of
17 Jerry, could be used. And Jerry could
18 create any new Misfits merchandise using
19 his image, as long as it didn't use
20 Glenn's image.

21 **Q And you say you've seen the**
22 **settlement agreement. Did Glenn Danzig**
23 **show it to you in connection with these**
24 **discussions or did you come to see it**
25 **sometime later?**

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1 **FELIX SEBACIOUS**

2 A I came to see it sometime later.

3 **Q Would that be in connection with**
4 **preparing for this deposition today?**

5 A No, it would not.

6 **Q What were the circumstances, if you**
7 **recall, by which you came to see the**
8 **settlement agreement?**

9 A I received a copy of it in 2004
10 during -- I had requested a copy in
11 connection with, I guess, with a trademark
12 issue that this deposition is looking to
13 resolve.

14 **Q I want to talk about what started**
15 **happening in 2004 a little bit later.**

16 A Understood. I didn't want to jump
17 ahead too far myself.

18 **Q In connection with your discussions**
19 **with Danzig in 1999, did he express any**
20 **view with respect to the Misfits as a**
21 **property or the Misfits as a band?**

22 A I don't understand the question.

23 **Q Was he positive about the Misfits or**
24 **negative about the Misfits?**

25 A He was very positive about the

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1 **FELIX SEBACIOUS**

2 Misfits.

3 **Q Did he express any opinion on the**
4 **Misfits band that was active at that time**
5 **in 1999?**

6 A I don't recall.

7 **Q Now, you said originally you had**
8 **sought to license the Danzig property from**
9 **him?**

10 A Yes.

11 **Q And that he had proposed, as well,**
12 **nonexclusive rights to the Misfits**
13 **property; is that right?**

14 A That is correct.

15 **Q And did he express any desire to do**
16 **that because the Misfits had become more**
17 **popular in recent years?**

18 A My recollection is that Glenn's
19 comment -- or he had rights that were not
20 being utilized and, therefore, there was
21 profit to be made from it. And he
22 certainly -- and this is speculation on my
23 part, but he certainly gave the impression
24 that he was a very profit-oriented young
25 man, or not so young, I should say.

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1 **FELIX SEBACIOUS**

2 **Q In the course of your discussions**
3 **with him in 1999, did he express any**
4 **opinion of Jerry Only or Cyclopien or what**
5 **Cyclopien was doing with the Misfits'**
6 **properties?**

7 A Again, it's a bit of speculation on
8 my part. Mr. Danzig, from time to time,
9 would have comments about Jerry, almost
10 the way two brothers would discuss each
11 other. It seemed to me, again, pure
12 speculation, a very love/hate
13 relationship. They were very close
14 together in the band for years, and then
15 after the split they became almost a Cain
16 and Abel situation. So I suspect there
17 were certain profanities used in
18 connection with Mr. Only's name. I don't
19 recall any specifics.

20 **Q Would it be fair to say that Danzig**
21 **was negative towards Jerry Only at that**
22 **time?**

23 A I would say it would be fair to say
24 that there were times when he was negative
25 and times when he was positive.

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EXHIBIT 3

Issued by the
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GLENN DANZIG

vs.

CYCLOPIAN MUSIC, INC.

SUBPOENA IN A CIVIL CASE

CANCELLATION NUMBER: 92045173
(United States Patent and Trademark Office Before
the Trademark Trial and Appeal Board)

TO: Bravado International
330 7th Avenue, 2nd Floor
New York, New York 10001

☐ YOU ARE COMMANDED to appear in the United States District court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case in accordance with ATTACHMENT "A."

PLACE OF DEPOSITION

Kirkpatrick & Lockhart Nicholson Graham LLP
599 Lexington Avenue
New York, New York 10022

DATE AND TIME

September 20, 2006, 10:00 a.m.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): See Attachment "B"

PLACE:

Kirkpatrick & Lockhart Nicholson Graham LLP
599 Lexington Avenue
New York, New York 10022

DATE AND TIME

August 31, 2006, 10:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)
Curtis B. Krasik
Counsel for Registrant

DATE

August 4, 2006

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Curtis B. Krasik
Kirkpatrick & Lockhart Nicholson Graham LLP
Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, Pennsylvania 15222
(412) 355-6500

ATTACHMENT A

Pursuant to Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 404 and Fed.R.Civ.P. 30(b)(6), Bravado International, shall designate one or more witnesses knowledgeable to testify regarding the subject matters identified in Section II below in accordance with the following definitions.

I. Definitions

1. "Bravado" refers to Bravado International and its predecessors, including but not limited to Blue Grape Merchandising, Inc., subsidiaries, parents, affiliates, successors and assigns, past and present officers, directors, partners, employees, agents, attorneys, and representatives as well as all other persons acting or purporting to act or its behalf for any purpose whatsoever.

2. "MISFITS Mark" refers to the trademark or service mark MISFITS in any font, style, size or color.

3. "Registrations" refers to U.S. Trademark Registration No. 2,793,533 for the mark MISFITS in Class 14; U.S. Trademark Registration No. 2,634,215 for the mark MISFITS in Classes 9, 16 and 41; and U.S. Trademark Registration No. 2,735,848 for the mark MISFITS (Stylized) in Classes 9 and 16.

4. "Danzig" refers to Glenn Danzig, his employees, agents, representatives, attorneys, affiliates, successors and assigns, any company owned or controlled by Glenn Danzig, and persons and entities acting or purporting to act on behalf of Glenn Danzig.

5. The term "including" shall mean "including without limitation."

II. Subjects of Deposition

1. All facts and circumstances relating to Bravado's use of the MISFITS Mark.
2. All facts and circumstances relating to any agreements between Bravado and Danzig regarding the use of the MISFITS Mark, including any license agreements.
3. All facts and circumstances relating to Bravado's decision to enter into any agreement with Danzig regarding the use of the MISFITS Mark, including any license agreements.
4. All communications with Danzig relating to Bravado's use of the MISFITS Mark.
5. All facts and circumstances relating to all products offered for sale by Bravado using the MISFITS Mark.
6. Bravado's response to the Subpoena served by Cycloplan in this proceeding, including efforts undertaken by Bravado to identify, search for, and produce documents responsive to the Subpoena's requests.

ATTACHMENT B

For purposes of responding to this Subpoena, you should produce the documents and things requested in Section III below in accordance with the following Instructions and Definitions.

I. Instructions

A. In making each response, you are required to furnish all requested items in your possession, custody, or control, including items in the possession, custody, or control of any attorney or agent or any person acting on your behalf.

B. You must produce *in toto* all documents and things produced in response to these requests, notwithstanding the fact that portions may contain information not requested, and you must include draft as well as final versions or editions of each document, as well as any editions or copies of the document that are not identical to the original (whether due to handwritten notations, revisions or otherwise).

C. The documents and things produced shall include all attachments and enclosures.

D. If any documents or things requested herein have been lost or destroyed, the documents and things so lost or destroyed shall be identified by author, date, and subject matter.

E. If a refusal to produce documents and things is stated on the grounds of burdensomeness, identify the number and nature of documents and things subject to

production, the location and present custodian of the documents and things, and the estimated number of hours and the cost that would be required to produce such documents and things.

F. For each document that is responsive to a Request which is sought to be withheld under a claim of attorney-client privilege, work product doctrine protection, or any other privilege, provide the following information: the date of the document, the name(s) and title(s) of its author(s) and the name(s) and title(s) of the person(s) to whom it was directed or circulated, its nature (*e.g.*, letter, memorandum, etc.), its subject matter and the basis for the claim of privilege.

G. These requests are to be deemed continuing.

II. Definitions

1. "Bravado" refers to Bravado International and its predecessors, including but not limited to Blue Grape Merchandising, Inc., subsidiaries, parents, affiliates, successors and assigns, past and present officers, directors, partners, employees, agents, attorneys, and representatives as well as all other persons acting or purporting to act on its behalf for any purpose whatsoever.

2. "MISFITS Mark" refers to the trademark or service mark MISFITS in any font style, size or color.

3. "Registrations" refers to U.S. Trademark Registration No. 2,793,533 for the mark MISFITS in Class 14; U.S. Trademark Registration No. 2,634,215 for the mark MISFITS in Classes 9, 16 and 41; and U.S. Trademark Registration No. 2,735,848 for the mark MISFITS (Stylized) in Classes 9 and 16.

4. "Danzig" refers to Glenn Danzig, his employees, agents, representatives, attorneys, affiliates, successors and assigns, any company owned or controlled by Glenn Danzig, and persons and entities acting or purporting to act on behalf of Glenn Danzig.

5. The term "including" shall mean "including without limitation."

6. "Person" means any natural individual, partnership, association, corporation, business, government entity, or other legal entity.

7. The terms "document" or "documents" whenever used herein shall be construed in the broadest sense in accordance with Fed.R.Civ.P. 34, and includes without limitation all written, typed, printed, recorded, photographic, graphic matter, or electronically or magnetically stored or recorded information of whatever kind or form, of every type and description, however and by whomever prepared, produced, reproduced, disseminated or made, in any form, whether originals or copies, now or formerly in the possession, custody or control of you, your agents, employees, and attorneys, or any of them.

8. A request for documents that "relate to" a given subject matter shall be construed in the broadest sense and shall include all documents that, in any way, directly or indirectly, constitute, embody, concern, comprise, reflect, identify, state, refer to, report upon, respond to, describe, analyze, contain information concerning, arise out of, or are in any way pertinent to that subject matter.

III. Requests

1. All documents that relate to any agreement or contract, including all documents that relate to the negotiation of such agreements or contracts, between Bravado and Danzig regarding use of the MISFITS Mark.
2. All documents that relate to Danzig's claimed ownership of, or rights in, the MISFITS Mark.
3. All documents that relate to any correspondence with Danzig regarding use of the MISFITS Mark.
4. All documents that relate to all uses of the MISFITS Mark, including documents that identify each and every product offered for sale using the MISFITS Mark.
5. With respect to all products Bravado offered for sale using the MISFITS Mark, all documents that relate to the (i) date(s); (ii) geographic location(s); (iii) dollar volume of sales; and/or (iv) number of units or pieces of products sold.

EXHIBIT 4

EXHIBIT FILED UNDER
SEAL

EXHIBIT 5

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Registration Nos. 2,793,533, 2,634,215 and 2,735,848
Issued on December 16, 2003, October 12, 2002 and April 22, 2003, respectively

GLENN DANZIG, Petitioner, v. CYCLOPIAN MUSIC, INC., Registrant.	Cancellation No. 92045173 Mark: MISFITS Our File No.: 64162-0002
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TO REGISTRANT CYCLOPIAN MUSIC, INC. AND ITS ATTORNEYS OF RECORD:

Petitioner Glenn Danzig ("Danzig" or "Respondent") hereby responds and objects to the First Set of Interrogatories propounded on May 26, 2006 by Registrant Cyclopien Music, Inc. ("Cyclopien" or "Registrant").

PRELIMINARY STATEMENT

Danzig is presently pursuing his investigation and analysis of the facts and law relating to this case, and has not completed his discovery or preparation for trial. Therefore, the responses set forth herein are given without prejudice to Danzig's right to produce evidence of any subsequent facts or interpretations thereof, or to add to, modify or otherwise change or amend the responses herein. The information hereinafter set forth is true and correct to the best knowledge of Danzig as of this date, and is subject to correction for inadvertent errors, mistakes or omissions, if any such errors, mistakes or omissions should be found to exist. These

responses are based upon records and information presently available to Danzig. References in a response to a preceding or subsequent response incorporates both the information and objections set forth in the referenced response.

Danzig reserves the right to introduce at trial any and all documents heretofore or hereinafter produced by the parties in this action or by any third party that supports or tends to support its contentions at trial or in support of or in opposition to any motion in this case. To the extent that Danzig identifies certain documents or delineates facts contained within any document or otherwise, it does so without prejudice to establish at a later date any additional facts that may be contained within or discovered as a result of subsequent review of such document or as a result of any additional investigation and discovery.

Inadvertent identification or production of documents or information by Danzig does not constitute a waiver of any applicable privilege, nor does information or production of any documents or information waive any objection, including relevancy, to the admission of such document in evidence.

GENERAL OBJECTIONS

The responses set forth below are submitted subject to the following general objections. These general objections are made to each and every individual request and are incorporated by reference into each of the specific responses set forth below. From time to time, and for purpose of emphasis, Danzig may restate one or more of the General Objections as specific objections to individual Interrogatories. Such restatement, or the failure to restate, should not be taken as a waiver of any General Objection not restated.

GENERAL OBJECTION NO. 1

Danzig objects to Cycloplan's "Definitions" to the extent they purport to impose on Danzig obligations beyond those imposed by the Code of Civil Procedure and the Trademark Trial and Appeal Board Manual of Procedure.

GENERAL OBJECTION NO. 2

Danzig objects to each and every Interrogatory to the extent that it calls for information protected from disclosure by the attorney-client privilege, work-product doctrine and/or any other applicable privilege or protection from discovery.

GENERAL OBJECTION NO. 3

Danzig objects to each and every Interrogatory to the extent that it purports to require Danzig to produce information that is not within his possession, custody or control.

GENERAL OBJECTION NO. 4

Danzig objects to each and every Interrogatory to the extent that it is neither relevant to any claim or defense in this action, nor reasonably calculated to lead to the discovery of admissible evidence.

GENERAL OBJECTION NO. 5

Danzig objects to each and every Interrogatory to the extent that it calls for information that is protected by his and/or other's rights of confidentiality and/or privacy, as provided by contract or other agreement, the California and United States Constitutions and/or any other statute or legal authority.

GENERAL OBJECTION NO. 6

Plaintiff objects to each and every Interrogatory to the extent that it calls for the production of trade secrets, confidential information or proprietary information regarding Plaintiff's business activities and/or business operations. Danzig will produce such information pursuant to the terms of a mutually agreed upon Protective Order entered by the TTAB.

RESPONSES TO REGISTRANT'S FIRST SET OF INTERROGATORIES

INTERROGATORY NO. 1:

Identify when and how you first became aware of U.S. Trademark Registration No. 2,793,533 ("533 Registration") or the application leading to the '533 Registration. In your response, identify every person known to you to have knowledge of when and how you first became aware of the '533 Registration or the application leading to the '533 Registration and every document that evidences such knowledge.

RESPONSE TO INTERROGATORY NO. 1:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to Interrogatory No. 1 on the grounds that it is overbroad and unduly burdensome. Danzig further objects to this Interrogatory because it is compound, and consists of three separate interrogatories, each of which count against the numerical limit of 75 set forth in 37 C.F.R. 2.120(d)(1).

Subject to and without waiver of his objections, Danzig responds as follows: Danzig first learned of Cycloplan's registration of the MISFITS marks when he received an e-mail message from Gerald Caiafa's manager, John Califera, claiming that Cycloplan owned the exclusive rights to the MISFITS marks and in particular the MISFITS "skull" mark. Danzig immediately notified Cycloplan that, under the parties' settlement agreement, neither party could independently or exclusively claim ownership rights to the MISFITS marks. Danzig also immediately undertook an investigation to determine what marks Cycloplan had sought to register and what rights

Cycloplan was claiming. Through this investigation, Danzig discovered Cycloplan's registrations for the MISFITS marks.

The following individuals were aware of Danzig's discovery of Cycloplan's registration of the MISFITS marks:

Glenn Davis, attorney for Glenn Danzig

John Califera, manager for Gerald Caiafa

Felix Sebacious, Bluegrape merchandizing

INTERROGATORY NO. 2:

Identify when and how you first became aware of U.S. Trademark Registration No. 2,634,215 ("215 Registration") or the application leading to the '215 Registration. In your response, identify every person known to you to have knowledge of when and how you first became aware of the '215 Registration or the application leading to the '215 Registration and every document that evidences such knowledge.

RESPONSE TO INTERROGATORY NO. 2:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to Interrogatory No. 2 on the grounds that it is overbroad and unduly burdensome. Danzig further objects to this Interrogatory because it is compound, and consists of three separate interrogatories, each of which count against the numerical limit of 75 set forth in 37 C.F.R. 2.120(d)(1).

Subject to and without waiver of his objections, Danzig responds as follows: Danzig first learned of Cycloplan's registration of the MISFITS marks when he received an e-mail message from Gerald Caiafa's manager, John Califera, claiming that Cycloplan owned the exclusive rights to the MISFITS marks and in particular the MISFITS "skull" mark. Danzig immediately notified Cycloplan that, under the parties' settlement agreement, neither party could independently or exclusively claim ownership rights to the MISFITS marks. Danzig also immediately undertook an investigation to determine what marks Cycloplan had sought to register and what rights

Cyclopien was claiming. Through this investigation, Danzig discovered Cyclopien's registrations for the MISFITS marks.

The following individuals were aware of Danzig's discovery of Cyclopien's registration of the MISFITS marks:

Glenn Davis, attorney for Glenn Danzig

John Califera, manager for Gerald Caiafa

Felix Sebacious, Bluegrape merchandizing

INTERROGATORY NO. 3:

Identify when and how you first became aware of U.S. Trademark Registration No. 2,735,848 ("848 Registration") or the application leading to the '848 Registration. In your response, identify every person known to you to have knowledge of when and how you first became aware of the '848 Registration or the application leading to the '848 Registration and every document that evidences such knowledge.

RESPONSE TO INTERROGATORY NO. 3:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to Interrogatory No. 3 on the grounds that it is overbroad and unduly burdensome. Danzig further objects to this Interrogatory because it is compound, and consists of three separate interrogatories, each of which count against the numerical limit of 75 set forth in 37 C.F.R. 2.120(d)(1).

Subject to and without waiver of his objections, Danzig responds as follows: Danzig first learned of Cyclopien's registration of the MISFITS marks when he received an e-mail message from Gerald Caiafa's manager, John Califera, claiming that Cyclopien owned the exclusive rights to the MISFITS marks and in particular the MISFITS "skull" mark. Danzig immediately notified Cyclopien that, under the parties' settlement agreement, neither party could independently or exclusively claim ownership rights to the MISFITS marks. Danzig also immediately undertook an investigation to determine what marks Cyclopien had sought to register and what rights

Cyclopian was claiming. Through this investigation, Danzig discovered Cyclopian's registrations for the MISFITS marks.

The following individuals were aware of Danzig's discovery of Cyclopian's registration of the MISFITS marks:

Glenn Davis, attorney for Glenn Danzig

John Califera, manager for Gerald Caiafa

Felix Sebacious, Bluegrape merchandizing

INTERROGATORY NO. 4:

Identify each and every product you have sold or offered for sale using the MISFITS Mark since December 31, 1994.

RESPONSE TO INTERROGATORY NO. 4:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to Interrogatory No. 4 on the grounds that it is overbroad and unduly burdensome.

Subject to and without waiver of his objections, Danzig responds as follows: Danzig has sold at least the following items under the MISFITS mark since December 31, 1994: t-shirts, sweatshirts, and stickers. Danzig additionally responds that products bearing the MISFITS marks were sold through licensed merchandising companies, who handled the production and sale of these items. Danzig is unable to provide a list of such products.

INTERROGATORY NO. 5:

For each product identified in response to Interrogatory No. 4, identify (i) the date(s) the product was sold or offered for sale; (ii) the geographic location(s) where the product was sold or offered for sale; (iii) the person(s) involved in the sale of the product, the distribution of the product and the offer to sell the product; (iv) the dollar volume of sales for the product; and (v) the number of units or pieces sold.

RESPONSE TO INTERROGATORY NO. 5:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further incorporates his objections to Interrogatory No. 4 as if fully set forth herein. Danzig further objects to this Interrogatory because it is compound, and consists of five separate interrogatories, each of which count against the numerical limit of 75 set forth in 37 C.F.R. 2.120(d)(1).

Subject to and without waiver of his objections, Danzig responds as follows: Products bearing the MISFITS marks were sold through licensed merchandising companies, who handled the production and sale of these items. Danzig is unable to provide the information requested for such products.

INTERROGATORY NO. 6:

Identify each and every service you have performed or offered to perform using the MISFITS Mark since December 31, 1994.

RESPONSE TO INTERROGATORY NO. 6:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to Interrogatory No. 4 on the grounds that it is overbroad and unduly burdensome.

Subject to and without waiver of his objections, Danzig responds as follows: Following the sale of the Misfits catalog, Danzig did not perform or make any appearances under the Misfits name.

INTERROGATORY NO. 7:

For each service identified in response to Interrogatory No. 6, identify (i) the date(s) the service was performed or offered; (ii) the geographic location(s) where the service was performed or offered; (iii) the person(s) involved in the performance of the service, or the offer to perform; and (iv) the revenues and profits generated from the performance of the service.

RESPONSE TO INTERROGATORY NO. 7:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further incorporates his objections to Interrogatory No. 6 as if fully set forth herein. Danzig further objects to this Interrogatory because it is compound, and consists of four separate interrogatories, each of which count against the numerical limit of 75 set forth in 37 C.F.R. 2.120(d)(1).

Subject to and without waiver of his objections, Danzig responds as follows: Following the sale of the Misfits catalog, Danzig did not perform or make any appearances under the Misfits name.

INTERROGATORY NO. 8:

Identify each and every agreement or contract between you and any other person regarding use of the MISFITS Mark, including any license agreements or consent agreements. In your response, identify every person known to you to have knowledge of such agreements and every document that evidences such agreements.

RESPONSE TO INTERROGATORY NO. 8:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to this Interrogatory on the grounds that it is overbroad and unduly burdensome in that it is not limited as to time. Danzig further objects to this Interrogatory because it is compound, and consists of four separate interrogatories, each of which count against the numerical limit of 75 set forth in 37 C.F.R. 2.120(d)(1).

Subject to and without waiver of his objections, Danzig responds as follows: Danzig has licensed the MISFITS marks to various merchandising companies. Since December 31, 1994, Danzig has licensed the MISFITS marks to at least the following companies: Brockrum, Bluegrape and Chaser.

The following individuals have knowledge of Danzig's agreements to license the MISFITS marks:

Glenn Davis, attorney to Glenn Danzig

Bridget Wright, agent to Glenn Danzig
Scott Harrington, former attorney to Glenn Danzig
Bob Ringe, former manager to Glenn Danzig
Robert Arce, Chaser merchandising
Felix Sebacious, Bluegrape merchandizing

INTERROGATORY NO. 9:

Identify each and every agreement or contract between you and any other person regarding ownership of the MISFITS Mark, including any assignments. In your response, identify every person known to you to have knowledge of such agreements and every document that evidences such agreements.

RESPONSE TO INTERROGATORY NO. 9:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to this Interrogatory on the grounds that it is overbroad and unduly burdensome in that it is not limited as to time. Danzig further objects to this Interrogatory because it is compound, and consists of four separate interrogatories, each of which count against the numerical limit of 75 set forth in 37 C.F.R. 2.120(d)(1).

Subject to and without waiver of his objections, Danzig responds as follows: The only agreement presently in effect that governs ownership of the MISFITS marks is the settlement agreement between the parties to this action.

INTERROGATORY NO. 10:

Identify all corporations, partnerships and/or other entities in which you own any interest.

RESPONSE TO INTERROGATORY NO. 10:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to this Interrogatory on the grounds that it is overbroad and unduly burdensome in that it requests information regarding Danzig's activities unrelated to the MISFITS marks or this

Proceeding. Danzig further objects to this Interrogatory on the grounds that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of relevant or admissible information.

INTERROGATORY NO. 11:

Identify and describe with particularity all factual and legal bases for your allegation that you are "co-owner of the name and trademark the MISFITS." In your response, identify every person known to you to have knowledge of such facts and every document that evidences such facts.

RESPONSE TO INTERROGATORY NO. 11:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to this Interrogatory because it calls for information that is available to Cycloplan in documents and court files which are a matter of public record and, thus, the Interrogatory is unduly burdensome and/or harassing.

Subject to and without waiver of his objections, Danzig responds as follows: Information responsive to this Interrogatory is set forth in detail in Danzig's complaint on file in this action and Danzig's Opposition to Cycloplan's Motion to Dismiss, filed on or about January 18, 2006, both of which are incorporated herein by reference. Substantially the same information as requested by this Interrogatory can be readily ascertained by reviewing the foregoing documents. Responsive information can also be found in the settlement agreement between the parties, which is equally available to Cycloplan.

The following individuals have knowledge of the facts that support Danzig's claims:

Glenn Davis, attorney to Glenn Danzig

Gerald Caiafa

Paul Caiafa

John Califera, manager for Gerald Caiafa

INTERROGATORY NO. 12:

Identify and describe with particularity all factual and legal bases for your allegation that the Registrations "are invalid and were fraudulently obtained by Registrant." In your response, identify every person known to you to have knowledge of such facts and every document that evidences such facts.

RESPONSE TO INTERROGATORY NO. 12:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to this Interrogatory because it calls for information that is available to Cycloplan in documents and court files which are a matter of public record and, thus, the Interrogatory is unduly burdensome and/or harassing.

Subject to and without waiver of his objections, Danzig responds as follows: Information responsive to this Interrogatory is set forth in detail in Danzig's complaint on file in this action and Danzig's Opposition to Cycloplan's Motion to Dismiss, filed on or about January 18, 2006, both of which are incorporated herein by reference. Substantially the same information as requested by this Interrogatory can be readily ascertained by reviewing the foregoing documents. Responsive information can also be found in the settlement agreement between the parties, which is equally available to Cycloplan.

The following individuals have knowledge of the facts that support Danzig's claims:

Glenn Davis, attorney to Glenn Danzig

Gerald Caiafa

Paul Caiafa

John Califera, manager for Gerald Caiafa

INTERROGATORY NO. 13:

Identify and describe with particularity all factual and legal bases for your contention that the "Settlement Agreement does not place any limits on co-ownership of the MISFITS marks in

terms of particular goods and services." In your response, identify every person known to you to have knowledge of such facts and every document that evidences such facts.

RESPONSE TO INTERROGATORY NO. 13:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to this Interrogatory because it calls for information that is available to Cycloplan in documents and court files which are a matter of public record and, thus, the Interrogatory is unduly burdensome and/or harassing.

Subject to and without waiver of his objections, Danzig responds as follows: Information responsive to this Interrogatory is set forth in detail in Danzig's complaint on file in this action and Danzig's Opposition to Cycloplan's Motion to Dismiss, filed on or about January 18, 2006, both of which are incorporated herein by reference. Substantially the same information as requested by this Interrogatory can be readily ascertained by reviewing the foregoing documents. Responsive information can also be found in the settlement agreement between the parties, which is equally available to Cycloplan.

The following individuals have knowledge of the facts that support Danzig's claims:

Glenn Davis, attorney to Glenn Danzig

Gerald Caiafa

Paul Caiafa

John Califera, manager for Gerald Caiafa

INTERROGATORY NO. 14:

Identify and describe with particularity all factual and legal bases for your contention that Gerard Caiafa's and Paul Caiafa's exclusive right to publicly perform and record as the Misfits "is separate from, and has no impact on," your alleged trademark co-ownership rights. In your response, identify every person known to you to have knowledge of such facts and every document that evidences such facts.

RESPONSE TO INTERROGATORY NO. 14:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to this Interrogatory because it calls for information that is available to Cycloplan in documents and court files which are a matter of public record and, thus, the Interrogatory is unduly burdensome and/or harassing.

Subject to and without waiver of his objections, Danzig responds as follows: Information responsive to this Interrogatory is set forth in detail in Danzig's complaint on file in this action and Danzig's Opposition to Cycloplan's Motion to Dismiss, filed on or about January 18, 2006, both of which are incorporated herein by reference. Substantially the same information as requested by this Interrogatory can be readily ascertained by reviewing the foregoing documents. Responsive information can also be found in the settlement agreement between the parties, which is equally available to Cycloplan.

The following individuals have knowledge of the facts that support Danzig's claims:

Glenn Davis, attorney to Glenn Danzig

Gerald Caiafa

Paul Caiafa

John Califera, manager for Gerald Caiafa

INTERROGATORY NO. 15:

Identify specifically and in detail the harm, if any, suffered by you as a result of the Registrations. In your response, identify every person known to you to have knowledge of such harm and every document that evidences such harm.

RESPONSE TO INTERROGATORY NO. 15:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to this Interrogatory on the grounds that it is vague and ambiguous in that the terms "harm" and "result" are not defined.

Subject to and without waiver of his objections, Danzig responds as follows:

Representatives of Cycloplan claimed exclusive rights in the MISFITS marks and threatened legal action against businesses that carried Danzig's MISFITS merchandise, including, without limitation, Hot Topic. Cycloplan directly contacted businesses selling Danzig's MISFITS products to make these threats and sought to discourage companies from doing business with Danzig or his licensees. Cycloplan's actions constituted interference with existing and prospective business relationships and interfered with Danzig's ability to exploit his product as permitted by the parties' settlement agreement.

Individuals with knowledge of Cycloplan's interference with Danzig's business activities and the damage caused by Cycloplan's actions include:

Glenn Davis, attorney to Glenn Danzig

Robert Arce, Chaser merchandising

Felix Sebacious, Bluegrape merchandizing

INTERROGATORY NO. 16:

Identify each person you intend to call as a witness during the testimony period and describe with particularity the subject matter on which the witness is expected to testify. For any expert witnesses, identify and describe with particularity: (i) each opinion and conclusion on which the expert is expected to testify; (ii) the expert's qualifications, including without limitation, educational background, professional experience, writings, professional appointments and associations; and (iii) all documents and information provided to and/or considered by the expert.

RESPONSE TO INTERROGATORY NO. 16:

Danzig incorporates his General Objections as if fully set forth herein. Danzig further objects to this Interrogatory on the grounds that it is overbroad and unduly burdensome. Danzig further objects to this Interrogatory because it is compound, and consists of two separate interrogatories, each of which count against the numerical limit of 75 set forth in 37 C.F.R.

2.120(d)(1). Danzig further objects to this Interrogatory on the grounds that it calls for premature disclosure of expert testimony and information in violation of Rule 26 of the Federal Rules of Civil Procedure. Danzig will disclose expert testimony and information only in accordance with the applicable federal rules and TTAB rules.

Subject to and without waiver of his objections, Danzig responds as follows: This lawsuit is in its initial stages and discovery is continuing. Danzig has therefore not made a final determination regarding the witnesses to be called during the testimony period and expressly reserves the right to amend, supplement and revise this response as its discovery continues and as further information become available.

The following individuals may be called during the testimony period:

Glenn Danzig, Petitioner. Mr. Danzig has knowledge regarding the parties' settlement agreement, Petitioner's use of the MISFITS marks, and the damage to Petitioner as a result of Cyclopien's registration of the MISFITS marks.

Gerald Caiafa. Mr. Caiafa has knowledge regarding the parties' settlement agreement and Cyclopien's use of the MISFITS marks.

Paul Caiafa. Mr. Caiafa has knowledge regarding the parties' settlement agreement and Cyclopien's use of the MISFITS marks.

Robert Arce, Chaser merchandising. Mr. Arce has knowledge regarding Petitioner's use and licensing of the MISFITS marks and the damage to Petitioner as a result of Cyclopien's registration of the MISFITS marks.

Felix Sebacious, Bluegrape merchandizing. Mr. Sebacious has knowledge regarding Petitioner's use and licensing of the MISFITS marks and the damage to Petitioner as a result of Cyclopien's registration of the MISFITS marks.

INTERROGATORY NO. 17:

Identify each and every person who provided information or assistance in preparing the answers to these interrogatories, including any person who gathered the information and documents.

RESPONSE TO INTERROGATORY NO. 17:

Glenn Danzig, Petitioner

Glenn Davis, attorney to Glenn Danzig,

Zoey Kohn, associate, Jeffer, Mangels, Butler & Marmaro LLP, attorneys of record.

Brian W. Kasell, partner, Jeffer, Mangels, Butler & Marmaro LLP, attorneys of record.

Respectfully submitted,

Dated: June 30, 2006

By: 

Rod S. Berman

Brian W. Kasell

Zoey Kohn

JEFFER, MANGELS, BUTLER & MARMARO, LLP

1900 Avenue of the Stars, 7th Floor

Los Angeles, CA 90067

Tel: (310) 203-8080

Fax: (310) 203-0567

Attorneys for Petitioner, Glenn Danzig

VERIFICATION

I have read the foregoing PETITIONER GLENN DANZIG'S RESPONSES TO APPLICANT CYCLOPIAN MUSIC, INC.'S FIRST SET OF INTERROGATORIES, and know its contents.

I am a party to this action, and I make this verification for that reason. I have read the foregoing document and know its contents. I am informed and believe that the matters stated herein are true.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on June 30, 2006, at 12:00

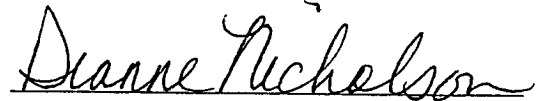


Glenn Danzig

CERTIFICATE OF SERVICE

It is hereby certified that on **June 30, 2006**, a copy of the foregoing **PETITIONER'S RESPONSE TO REGISTRANT'S FIRST SET OF INTERROGATORIES** has been sent by first class mail, postage prepared to the attorney of record for Registrant:

Curtis B. Krasik
Sabrina J. Hudson
KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP
535 Smithfield Street
Pittsburg, Pennsylvania 15222
Telephone: (412) 355-6500
Facsimile: (412) 355-6501



Dianne Nicholson